

(1994) 12 OHC CK 0025

In the Orissa High Court

Case No : Original Jurisdiction Case No. 3977 of 1991

S.K. Pattnaik

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-12-1994

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 2(12), 27, 28
Constitution of India, 1950 — Article 265, 372

Citation : (1995) 1 OLR 67

Hon'ble Judges : V.A. Mohta, C.J.; R.K. Patra, J.; D.P. Mohapatra, J

Bench : Full Bench

Advocate : Jayant Das, D.S. Tripathy, B.K. Sahoo, S. Mallik and K.P. Misra, for the Appellant; Sovesh Roy, Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

V.A. Mohta, C.J.—The petitioner imported into the State of Orissa India-Made Foreign Liquor and stored it in the licensed bonded warehouse from where liquor is released for sale. While liquor was stored in the warehouse, a portion of the imported stock became sediment and therefore, unfit for human consumption. The said stock was destroyed. A notice was issued to him for payment of countervailing duty on the said stock to the tune of Rs. 10,02,182.00. Validity of the said demand is questioned in this petition. According to the petitioner, the quantity of liquor lost in the bonded warehouse and which cannot be issued for sale therefrom cannot be subjected to countervailing duty under the Bihar and Orissa Excise Act, 1915 (the Act) in view of Section 28 thereof.

2. In support of the contention, the petitioner relied upon a Division Bench decision of this Court in the case of P.D. Jain v. State of Orissa (OJC No. 2241 of 1988, disposed of on 11-5-1992), which was followed in the case of Mohan Meakins Ltd. v. State of Orissa, (OJC No. 1971 of 1991. disposed of on 20-9-1993). The Division Bench hearing this matter felt that these two decisions of this Court need re-consideration, and hence, a reference was made to the Full

Bench. This is how the matter is before us.

3. Now, excise duty is essentially a duty on manufacture of goods while "countervailing duty is imposed when the articles are imported into the State in order to counter-balance the excise duty which may be levied on similar goods when manufactured within the State. Excise duty and countervailing duty is imposable under Entry 51 of List II in the Seventh Schedule to the Constitution and this position is reiterated in the Act by the definition clause Section 2 (6-a). Section 9 of the Act states that no intoxicant shall be imported unless the duty, if any payable under Chapter V has been paid or a bond has been executed for the payment thereof. Section 27 deals with "Power to impose duty on import, export, transport and manufacture". It reads thus:

"27. Power to impose duty on import export transport and manufacture-(1) An excise duty or 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 areas, on-

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

Explanation - Duty may be imposed on any article under this Sub-section at different rates 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 or 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 any tari drawn under any licence granted u/s 14, Sub-section(1)

(3) Notwithstanding anything contained in Sub-section (I)-

(i) duty shall not be imposed thereunder on any article which has been imported into India and was liable on such importation, to duty under the Indian Tariff Act, VIII of 1894. or the Sea Customs Act. VIII of 1878, if-

- (a) the duty as aforesaid has been already paid or
- (b) a bond has been executed for the payment of such duty; and

(ii) (Omitted by ALO, 1937)"

Section 28 deals with "ways of levying such duty". It reads thus :

"28, Ways of levying Bach duty Subject to any rules made u/s 90. Clause (12) any duty Imposed u/s 27 may be levied in any of the following ways:

(a) on any excisable article imported-

(i) by payment (upon or before importation in the State or in the State or territory from which the article is brought on

(ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act

(b) on an excisable article exported by payment in the State or in the State or territory to which the article is sent

(c) on an excisable article transported,

(i) by payment in the district from which the article is sent, or

(ii) by payment upon issue for sale from a warehouse established, authorised or continued under this Act;

(d) on intoxicating drugs manufactured, cultivated or collected,

(i) by a rate charged upon the quantity manufactured under a licence granted in respect of the provisions of Section 13, Clause (a), or issued for sale from a warehouse established, authorised or continued under this Act, or

(ii) by a rate assessed on the area covered by, or on the quantity or outturn of, the crop cultivated or collected under a licence granted in respect of the provisions of Section 13, Clause (b) or Clause (c);

(e) on spirit or beer manufactured in any distillery or brewery licensed, established, authorised or continued under this Act.-

(i) by a rate charged upon the quantity produced in or issued from the distillery or brewery, as the case may be, or issued for sale from a warehouse established, authorised or continued under this Act, or

(ii) in accordance with such scale of equivalents, calculate on the-quantity of materials used or by the degree of attenuation of the wash or wort, as the case may be as the State Government may prescribe ; and

(f) on tari drawn under a licence granted u/s 14 Sub-section (1) by a tax on each tree from which the drawing of tari is permitted;

Provided that, where payment is made upon the issue of an excisable article for sale from a warehouse, it shall be at the rate of duty in force on the date of issue of such article from such warehouse.

Provided also that no tax shall be levied in respect of any tree from which tari is drawn only for the manufacture of gur or molasses and under such special conditions as the Board may prescribe.

4. The term "import" means to bring into the State as the definition given in Section 2(12) shows. It is clear from the above scheme of the Act and so also the basic concept of countervailing duty that it is imposable at the time and at the point of import which essentially means its first entry into the State. Section 27 is the charging section and Section 28 deals with the assessment and collection of duty. The use of the words imposed "levied" and "payment" in Section 28. clearly Indicates that the three words are used in the sense of impost, assessment and collection. Imposition is as per Section 27 and assessment and payment, i.e. collection of duty, is as per Section 28. Collection may be at the stage of entry in the State and wherever permitted by the Act at the subsequent date and/or stage of removal from bonded warehouse for sale In that case payment of the duty shall be at the rate in force on that date. For administrative convenience, collection of duty, can be postponed but the duty is on goods actually imported it is thus clear that the charge or incidence is already attracted on the taxable event taking place, viz., import of goods in the State and the statutory facility of postponement of payment of duty under the Act and/or Rules . framed there under in no way affects the incidence of duty on the whole material imported.

5. Facility of storage in the bonded warehouse is given as per Section 17 and the relevant Rules, which prescribe a form of bond (Form No. GL. 2) to be executed by licensee of a bonded warehouse who wants to avail of that facility. The very description of bond is "General Bond for Import Export and Transport of Intoxicant without payment of Duty". It further speaks of permission to import without previous payment of duty. It also speaks of the specific quantity of goods imported and duty thereupon u/s 27 of the Act. This also indicates that duty is payable on the whole quantity of goods imported irrespective of what happens to those goods after import.

6. A somewhat similar question arose before the Supreme Court in the case of Shroff and Co. Vs. Municipal Corpn. of Greater Bombay and Another, . in the context of Sections 105 and 106 of the Bombay Prohibition Act, 1949 and it was held that countervailing duty is chargeable also on the goods lost after import, by way of breakages, pillage, etc. Learned Counsel for the petitioner submitted that the provisions of Sections 105 and 106 of that Act are different from the provisions of Sections 27 and 28 of the Act and the context of that case was the liability to pay "octroi" duty and not excise duty and therefore, ratio of that decision will not apply to the matter at hand. We do not agree. The two provisions are in part material and the context would make no difference. Entire discussion is about payment of countervailing duty on liquor lost in the bonded warehouse after its import in the State.

7. Our special attention was drawn to the word "levy" in Section 28 and Section

90(12) of the Act and it was contended that the said word should be read as impost or incidence of taxation. It may be mentioned that the word "levy" also appears in Section 106 of the "Bombay Act." The Supreme Court has held in M/s. Shroff and Co. case that the word "levy" is used in the sense of collection of duty. We reproduce below the material portion;

"...Section 106 of the Bombay Prohibition Act, 1949 is headed "Manners of levying excise duties". This clearly envisages administrative convenience for the point of levy in the sense of collection. The charge or - incidence correlated to the taxable event is on entry into the State by way of import. The rate applicable would normally be the rate prevailing at that time. However, a specific provision is made to get over this normal position by the proviso. The proviso would otherwise be redundant."

8. Inviting our attention to Article 265 of the Constitution, it was contended that the expressions "levy" and "collection" are constitutionally recognised as two different concepts and hence cannot be mixed up and these words used in the Act which is a pre-constitutional measure will have to be read only in that context in view of Article 372 of the Constitution. That levy and collection are two different concepts cannot be disouted. That would be the pre-constitutional as well as post-constitutional position. The word levy has frequently been used to include both of the first two stages involved in the process of taxation namely, the levy properly so-called and the determination of the amount of tax, in other words, the assessment. The words "levy" and "collection in Article 266 are used in a comprehensive manner and quite obviously they are intended to include and envelope the entire process of taxation commencing from the incidence to the actual recovery from the pocket of the citizen, and what Article 265 enjoins is that every stage in this entire process must be authorised by law The Supreme Court in the case of Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., , has laid down that the term "levy" is wider in its import than the term "assessment" and it may include both imposition of a tax as well as the assessment The terms imposition is generally used for the levy of tax by legislative provisions indicating the subject-matter of the tax and the rates at which it has to be taxed. The term assessment on the other hand, is generally used in our country for the actual procedure adopted in determining the amount of tax.

9. The object of Article 372 of the Constitution is to maintain continuity of the pre-existing laws after the constitution came into force till they are repealed, altered or amended by the competent authority. The expression "subject to other provisions of the Constitution" only means that if there is a conflict between the pre-existing law and the provision of the Constitution, the latter would prevail to the extent of the inconsistency We do not see any inconsistency between the concept of levy and collection in the Act and the Constitution. The word levy cannot be read only as "impost" for the purposes of Section 28 of the Act. since these words are used in that provision as indicating different stages of process of

taxation.

10. The case of P. D. Jain (supra) proceeds on the assumption that the word levy used in Sections 28 and 90(12) is in the context of Impost and not assessment which, with great respect, is basically incorrect. In the case of Kalyani Stores v. State of Orissa (OJC No. 1384 of 1976 decided on 2-8-1979) this Court had held that Section 27(1) makes the provision for imposition of duty, and it is at the point of import that the duty becomes payable. This decision has been considered in P. D. Jain's case, but has been distinguished on the ground that the former dealt with the liability of a retailer. In the matter of incidence of excise duty or countervailing duty, it makes no difference whether the case is of a retailer or of a wholesaler. It is true, as rightly observed in P. D. Jain's case that there cannot be any impost on non-existent goods. But, considering the incidence of taxation being on the goods imported, it cannot be said that impost was on non-existing goods. Reliance has been placed in P. D. Jain's case upon the decision of this Court in "the case of Chaitan Kumar Kakani v. State of Orissa 1989 (II) CLR 282. That case pertained to breakages during transit. It is not clear from the said judgment as to whether the breakages had taken place before actual entry in the State. What would be the position of the breakages to the goods brought under a pass before actual import is a larger question which need not be adjudicated upon in this case. In Chaitan Kumar (supra), the question of real incidence of tax was neither argued nor considered.

11. To conclude, the petition is dismissed. No costs. Interim order if any, stands automatically vacated.

D.P. Mohapatra, J.

12. I agree.

R.K. Patra, J.

13. I agree.