
(2011) 05 OHC CK 0006
In the Orissa High Court
Case No : Writ Petition (C) No. 21328 of 2010

Sri J. Srinivas Raju

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-05-2011

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 93(1)
Constitution of India, 1950 — Article 14

Citation : (2011) 2 OLR 342

Hon'ble Judges : V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This writ petition has been filed for quashing demand notice No. 329/2009 Ex. dated 10.07.2009 (Annexure-8), notice No. 1007/ Ex dated 28.10.2010 (Annexure-16) and the letter dated 12.10.2010 (Annexure-15). Annexures-8 and 16 are demand notices issued by the Collector, Nabarangpur and the Superintendent of Excise, Nabarangpur respectively to the Petitioner to deposit arrears of dues amounting to Rs. 1,21,81,528/-towards duty on account of short drawn Minimum Guaranteed Quantity (for short, "MGQ") for the year 2001-02. Annexure-15 is a communication sent by the Additional Secretary to Government to the Superintendent of Excise, Nabarangpur intimating that the Government order dated 26.11.2001 is not a general circular and it was with reference to representation of an individual licensee. The said communication further contains that in view of the decision of this Court in the case of Laxmi Narayan Mohanty v. State of Orissa and Ors. (2005) (Supp) OLR 423, wherein this Court held that the licensee cannot be exempted from the liability to pay the duty on account of short drawn MGQ, the Petitioner cannot take advantage of the letter dated 26.11.2001 to avail the exemption.

2. The facts and circumstances giving rise to the present writ petition, in a nutshell are that the State Government in Excise Department in their Excise

Policy dated 30.03.2001 have decided that the I.M.F.L. OFF shops will be settled afresh through auction followed by tender/negotiation for the year 2001-02. The State Government also issued letter dated 25.04.2001 for realization of MGQ of IMFL OFF Shops in the entire State and fixation of MGQ would be as per ratio of 22 LPL of IMFL and 33 BL of Beer per Rs. 1,000/-of consideration money/licence fees of the shop for the said years. Accordingly, opposite party No. 2 issued a sale notice dated 22.05.2001 for settlement of I.M.F.L. OFF Shops in the District of Nabarangpur for the year 2001-02 on the condition that the monthly MGQ in respect of IMFL OFF Shops will be 22 LPL of IMFL and 33 BL of Beer per Rs. 1,000/-of consideration money/licence fee. The Petitioner being the highest bidder was issued with licenses in respect of Umorkote No. II, Nabarangpur No. III, Tribeni Chowk and Papadahandi IMFL OFF shops by opposite party No. 2. The monthly licence fee and monthly MGQ fixed by opposite party No. 2 in the 3 licences of the Petitioner in respect of the above four IMFL OFF Shops are given below:

Name of OFF Shops

Monthly Licence Fee

Monthly MGQ of IMFL at 22 LPL

Monthly MGQ of Beer at 33 BL

UmorkoteNo.II

Rs.36,000/-

792 LPL

1188 BL

NabarangpurNo.III

Rs.70,000/-

1540 LPL

2310 BL

TribeniChowk

Rs.50,000/-

1100 LPL

1650 BL

Papadahandi

Rs.41,000/-

902 LPL

3. The State Government in Excise Department vide their letter dated 24.08.2001 took a decision fixing target for each shop at 3.31 times of the MGQ fixed at the time of settlement of the shops and directed that attempt/persuasion should be made to the individual licensee to lift the additional targeted quantity over and above the MGQ fixed for seven months i.e. September, 2001 to March, 2002. In the said letter it is further stated that in case there is any short fall in lifting IMFL and Beer, charges may be framed against the concerned Superintendent of Excise for loss of the Government Revenue. Pursuant to the said letter, opposite party No. 3-Superintendent of Excise, Nabarangpur issued letter dated 29.09.2001 to the licensees of IMFL OFF shops in the district of Nabarangpur and directed to lift the targeted IMFL and Beer according to shop wise/month wise statements for the year 2001-02 from the date of licence and the balance un-lifted quantity of target to be lifted during the remaining period of seven months i.e. September, 2001 to March, 2002. The Petitioner on receipt of letter dated 29.09.2001 immediately wrote letter dated 06.10.2001 to opposite party No. 2 that it was impossible to lift the target quantity of IMFL and Beer and requested to fix the MGQ as per licence. The Petitioner, being aggrieved by the said decision of the Government and opposite party No. 3 fixing the target to lift IMFL and Beer, also filed a writ petition bearing O.J.C. No. 13788 of 2001 before this Court for quashing order dated 29.09.2001 of opposite party No. 3 under Annexure-4. According to the Petitioner, he lifted the MGQ of IMFL and Beer fixed in the licences and opposite No. 3 certified that there was No. short fall of MGQ during the year 2001-02. Since there is No. due against the Petitioner, the Collector renewed the licences of the Petitioner for the years 2002-03 to 2009-10. While the matter stood thus, opposite party No. 2 issued demand notice dated 10.07.2009 to the Petitioner that he was liable to pay Rs. 1,21,81,528/-towards duty on unlifted MGQ for the year 2001-02. On receipt of the same, the Petitioner filed representation dated 08.10.2009 before opposite party No. 2 to recall the demand notice as he was not liable to pay the same as per law and applied for renewal of his IMFL Off shops at Umorkote No. II, Tribeni Chowk and Papadahandi for the year 2010-11 and deposited four months advance licence fee amounting to Rs. 9,02,012/-and opposite party No. 3 renewed the said three licences upto to 30.09.2010. The Petitioner again filed a representation dated 02.08.2010 before opposite party No. 2 to recall demand notice dated 10.07.2009, but opposite party No. 2 rejected the said representation. Opposite party No. 3 vide letter dated 19.08.2010 again directed the Petitioner to deposit the duty on the un-lifted quantity as per the target. The licences of the Petitioner were renewed for the period 01.10.2010 to 31.03.2011. Opposite party No. 2 on 28.10.2010 issued a letter calling upon the Petitioner to deposit the arrears of dues on un-lifted MGQ of IMFL and Beer as per the target fixed for the year 2001-02 vide letter dated 29.09.2001. Pursuant to the letters of opposite party Nos. 1 and 2 under Annexures-15 and 16, opposite party No. 3 has issued distress warrant dated 17.11.2010 and letter to the Tahasildar,

Nabarangpur to supply property list of the Petitioner to institute a certificate case under the O.P.D.R. Act for realization of the arrears of dues. Hence, the present writ petition.

4. Mr. Patra, learned Counsel appearing for the Petitioner submitted that the impugned demand notices under Annexures-8 and 16 and the impugned letter of the Government dated 12.10.2010 under Annexure-15 are illegal and contrary to Rule 6-A of the Orissa Excise (Exclusive Privilege) Foreign Liquor Rules, 1989 (for short, "Rules, 1989") and liable to be quashed. As per sale notice under Annexure-1 and Rule 6-A of the Rules, 1989, the MGQ of IMFL and Beer was fixed at 22 LPL of IMFL and 33 BL of Beer per Rs. 1000/-consideration money. Since the Petitioner has lifted MGQ fixed as per the licence he is not liable to pay the duty on short fall quantity of IMFL and Beer as per the target fixed by opposite party No. 3 in his letter dated 29.09.2001. The licences issued by the Collector fixing MGQ of IMFL and Beer is a contract and the Petitioner having fulfilled the said contract, it cannot be said that there is short fall of MGQ as per the said contract. Referring to Rule 6-A(1)(a)(b) and Rule 6. A(2) of the Rules, 1989, it is submitted that the impugned demand notices to pay the duty on the basis of the target fixed in the letter dated 29.09.2001 are illegal and without authority of law, contrary to Rules 6-A of the Rules, 1989. In view of the State Government letter dated 26.11.2001 under Annexure-7 the present demand notice dated 12.10.2010 is not sustainable in law. Pursuant to the decision of the Government vide letter dated 12.10.2010, No. licensee had lifted the IMFL and Beer as per the target and No. action has been taken against any licensee who had not lifted the enhanced MGQ as per the instruction of opposite party No. 3. Therefore, the action taken against the Petitioner amounts to discrimination. Even though in their letter dated 24.08.2001 the Government directed that attempt/persuasion should be made to the individual licensee to lift the additional targeted quantity and in case there is any short fall for lifting IMFL and Beer, charges may be framed against the concerned Superintendent of Excise for loss of Government Revenue, admittedly, No. action has been taken against the Excise Officials pursuant to letter dated 9.09.2010 under Annexure-14. Since the demand notices and letter of the Government dated 12.10.2010 are without any authority of law, the distress warrant and letter issued to the Tahasildar to supply the property list of the Petitioner to institute certificate Case under OPDR Act are illegal, arbitrary and liable to be quashed.

5. Per contra, learned Government Advocate appearing on behalf of the State-opposite parties vehemently opposed the contention taken by Mr. Patra and submitted that earlier a writ petition bearing O.J.C. No. 13788 of 2001 was filed challenging the letter dated 29.09.2001 wherein the Petitioner had been directed to lift IMFL and Beer for the year 2001-02 for Nabarangpur District by increasing the normal quota which was disposed of vide order dated 16.04.2009 with an observation that the same had become infructuous. Therefore, the Petitioner is liable for the loss caused to the State exchequer due to such non-lifting as per law. As per the terms and conditions of the licence and instruction issued by the

Government from time to time the Petitioner was legally bound to lift the quota as prescribed by the authorities from time to time for the year 2001-02 keeping in view the demand of liquor within Nabarangpur District. The Superintendent of Excise, Nabarangpur on the basis of the direction from the Government vide letter dated 24.08.2001 increased the quota of the Petitioner and asked him to lift the same. Since the Petitioner has not lifted the same, he is liable to pay the demand raised for non-lifting of the enhanced quota. Rule 6-A of the Rules, 1989 empowers the Excise Authorities to fix the target of MGQ to be lifted by the licensee for the particular period and in case of failure on the part of the licensee to lift the stock as guaranteed, action shall be taken to make good for the loss of Excise duty which shall be recovered from the bank guarantee obtained by the Collector before issue of licence and an agreement has to be executed to this effect.

6. In view of the decision of this Court in the case of Laxmi Narayan Mohanty (supra), it has been held that the licensee cannot be exempted from the liability to pay the duty on account of short drawn quantity of MGQ. This case is squarely applicable to the case of the Petitioner. The Petitioner cannot claim exemption from payment of the demand on the ground that similarly situated persons were not asked to pay duty on account of short drawn quantity of MGQ. u/s 93(1)(c) of Bihar and Orissa Excise Act, 1915 all amounts due to State Government by any person on account of any contract relating to Excise revenue, shall be recovered from the person or from his surety if any by distress and sale of his moveable property or by the process prescribed for recovery of arrears of land revenue. Therefore, since, the Petitioner failed to pay the arrear dues against the demand notices, the distress warrant was issued. Since, there was No. sufficient immovable property of the defaulter, the charges requisition was sent to initiate Certificate Case against the Petitioner to realise the arrears. There is a delay in issuing demand notice because of pending of the writ petition bearing O.J.C. No. 13788 of 2001. Merely because the State Government has not taken any action against the concerned Superintendent of Excise for loss of government revenue, the Petitioner cannot be exempted from paying the taxes, excise duty on the shop on revised short drawn MGQ. The Government has power to fix the target of IMFL and Beer even after fixation of the same by the Excise Commissioner and approved by the government which the E.P. holders have to carry out.

7. On the rival contentions, the following questions fall for consideration by this Court:

(i) Whether in exercise of the power under Rule 6-A(1) (a) and (b) of the Rules, 1989 the Excise Commissioner unilaterally can enhance MGQ in L.P.L. (I.M.F.L. and B.L. on Beer) beyond the MGQ fixed in the licence after issuance of licence and the licensee on account of failure on his part to lift the enhance quantity is liable to pay the duty on account of short drawn of such enhanced quantity ?

(ii) Whether demand notices dated 10.07.2009 (Annexure-8), dated 28.10.2010 (Annexure-16) and the letter dated 12.10.2010 (Annexure-15) are sustainable in

law?

(iii) What order?

8. Question No. (i) relates to power of the State Government to enhance the MGQ mentioned in the licence after issuance of the licence. Needless to say that on the basis of the licence issued, the Petitioner-licensee guarantees the sale of minimum guarantee quantity of foreign liquor/Beer as fixed by the Excise Commissioner.

9. In the instant case, there is No. dispute that the Petitioner has lifted the MGQ fixed in the licence and failed to lift the enhanced quantity subsequently fixed by the opposite party-licensing authority in the midst of the year i.e. after issuance of the licence.

10. According to the Petitioner, he has not guaranteed for lifting of any such enhanced quantity which is evident from the licence issued in his favour for the year 2001-02 and the State Government has No. power to enhance the MGQ fixed in the licence subsequent to issuance of licence for a particular period.

11. According to Opposite party-Excise Department, the government is empowered to enhance the quantity fixed in the licence and the licensee is bound to lift such enhanced quantity otherwise he is liable to pay the duty on short drawn of enhanced quantity to the Department. In support of their rival contentions, both the Petitioner and opposite parties relied upon Rule 6-A(1) (a) and (b) and Rule 6-A(2) of the Rules, 1989.

12. For proper adjudication of the issue, it is felt necessary to quote here Rule 6-A (1)(a) and (b) and Rule 6-A(2) of the Rules, 1989 on which both the parties have placed reliance.

6-A. Minimum guaranteed quantity of India Made foreign liquor - (1)(a) Every successful bidder of Foreign Liquor "OFF" shop/licensee of IMFL/Beer "ON" shop shall before obtaining licences, guarantee the sale of the minimum guaranteed quantity of Foreign Liquor as fixed by the Excise Commissioner. The bidder/licensee shall, before obtaining licence, submit monthly distribution statement to the concerned Collector. The Licensee before the 30th June, may revise and resubmit the monthly distribution statement for the portion of the excise year from August to March. The Collector shall be competent to revise and approve such revised statement. There shall be No. further changes in the distribution statement so approved.

(b) M.G.Q. in LPL [I.M.F.L. and BL on Beer] and duty thereon will be fixed by the Excise Commissioner from time to time subject to approval of Government.

(2) The licensee shall lift the monthly minimum guaranteed quantity approved for the month before

5.00 p.m. on the last working day of that month. The right to lift the monthly minimum guaranteed quantity for the month and left unlifted, if any, by 5.00

p.m. on the last working day of the month shall be forfeited. Unless specially permitted to be lifted in the subsequent month (* * *) by the Collector.

Provided that -

(i) The Collector may for any special reasons permit the licensee to lift the short drawn minimum guaranteed quantity of the previous month in the succeeding month except for obtaining the orders of the Commissioner of Excise in case of default and for any special reason if the period exceeds one month.

(ii) The Commissioner, may, wherever, if he deems it necessary permit the licensee to lift the short drawn minimum guaranteed quantity of any month other than the month of March in any subsequent month or months.

(iii) No. unlifted quantity of the Foreign Liquor shall be permitted to be lifted beyond the last day of February except where the Commissioner may, for reasons to be recorded in writing, permit the lifting of the unlifted MGQ upto last day of March.

13. Rule 6-A(1)(a) of the Rules, 1989 provides that the licensee shall guarantee to sell the MGQ of foreign liquor as fixed by the Excise Commissioner. Rule 6-A(1) (b) of the Rules, 1989 provides that the MGQ of IMFL and Beer and duty thereon will be fixed by the Excise Commissioner from time to time subject to approval of the Government.

14. No doubt Rule 6-A(1)(b) of the Rules, 1989 empowers the Excise Commissioner to fix from time to time the MGQ in L.P.L. (I.M.F.L. and B.L. on Beer) and the duty thereon subject to approval of the Government. Clause (b) must be conjointly read with Clause (a) of Sub-rule (1) of Rule 6. A of the Rules, 1989. Clause (b) cannot be interpreted in isolation from or inconsistent with Clause (a) of Rule 6. A(1) of the Rules, 1989. Both the above propositions of the Rules should be read together.

15. It is well settled legal position that, while interpreting the provisions of the statute, every part of the provisions of the statute has to be given effect and one part cannot be interpreted in a manner inconsistent with another part of the statute that would defeat the object and purpose of the Act and Rule. In Mohammad Ali Khan and Ors. v. Commissioner of Wealth-tax AIR 1997 S.C. 1165, the Supreme Court has quoted the following observations of the Court made in The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, :

The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of statute should have effect.

Similarly, in Grasim Industries Ltd. Vs. Collector of Customs, Bombay, , the apex Court has observed as under:

In matters of interpretation one should not concentrate too much on one word

and pay too little attention to other words. No. provision in the statute and No. word in any Section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used.

16. Conjoint reading of Rule 6-A(1)(a) and (b) of the Rules, 1989 makes it clear that M.G.Q. in LPL (IMFL and Beer) and duty thereon will be fixed by the Excise Commissioner from time to time subject to approval of the Government of Orissa and successful bidders of foreign liquor "OFF" Shop/licensee of IMFL/Beer "On Shop" shall before obtaining licence guarantee the sale of minimum guaranteed quantity of foreign liquor as fixed by the Excise Commissioner. The bidder/licensee shall before obtaining licence submit the monthly distribution system to the concerned Collector.

17. In the instant case, the Petitioner being the highest bidder he was issued with a licence in respect of Umorkote No. II, Nabarangpur No. III, Tribeni Chowk and Papadahandi IMFL OFF Shop by opposite party No. 2. In the said licence, the monthly licence fee and monthly M.G.Q. have been fixed by opposite party No. 2 in respect of the above four IMFL OFF Shops as stated above. Thus, the Petitioner-licensee is bound to lift the M.G.Q. in respect of four shops mentioned in the licence which, undisputedly he has lifted. Subsequently, the Superintendent of Excise, Nabarangpur vide his letter dated 29.9.2001 intimated the licensee-Petitioner that he has to lift the revised enhanced quantity of IMFL/Beer for the year 2001-02, which was much higher than the M.G.Q. fixed in the licence as the same is 3.31 times of the M.G.Q. fixed during the time of settlement of the shop. In paragraph 9 of the counter affidavit filed by opposite party Nos. 2 and 3 it is also stated that the target of excise revenue of the State for the year 2001-02 was fixed at Rs. 330 crores. Thus to make good of the deficit revenue of Rs. 240 crores from the duty on IMFL and Beer, the Government has taken a decision vide letter No. 5383/Ex dated 24.8.2001 to fix target on IMFL and Beer M.G.Q. to each shop which will be 3.31 times of the M.G.Q. fixed at the time of settlement. The letter dated 24.8.2001(Annexure-3) issued by the Excise Commissioner, Orissa, Cuttack reveals that such enhancement has been made to meet the internal target for collection of excise revenue during the year 2001-02, which has been fixed at Rs. 330 crores. The Petitioner objected such enhancement which was unilaterally fixed by the Superintendent of Excise, Nabarangpur. The Petitioner vide his letter dated 6.10.2001 (Annexure-5) intimated the Collector, Nabarangpur not to enhance the M.G.Q. and to maintain the M.G.Q. fixed in the licence. Thus, the Petitioner has not guaranteed sale of any quantity of foreign liquor more than the minimum guaranteed quantity fixed in the licence. In the licence issued in form No. F.L.-2 in respect of four shops it is mentioned that the holder of the licence is required to perform duly and faithfully and shall abide by the terms and the general conditions mentioned in the said licence. The condition No. 16 contains that monthly M.G.Q. fixed in the said licence is to be lifted by the licensee. It is not in dispute that the Petitioner lifted the M.G.Q. on payment of the consideration money fixed in the licence. It is also not in dispute that the Petitioner has not

guaranteed for lifting of any quantity more than the quantity mentioned in the licence. There is nothing in the statute to show that the Government is vested with the power to enhance the M.G.Q. mentioned in the licence after issuance of licence and the licensee is bound to lift such enhanced quantity. On the other hand, Rule 6-A(1) and Clause 16 of the licence provides that the successful bidder only guarantees the sale of the minimum quantity as fixed in the licence by the Excise Commissioner before obtaining the licence.

18. In view of the above, we are of the considered view that the Government is not vested with any power to enhance the M.G.Q. mentioned in the licence after issuance of licence which the licensee is bound to lift.

19. Placing reliance on the judgment of this Court in the case of Laxmi Narayan Mohanty (supra), it is contended by opposite parties that the Petitioner is bound to lift the enhanced MGQ. The ratio of the decision of this Court in Laxmi Narayan Mohanty (supra) is not applicable to the case of the Petitioner as the facts and issues involved in both the cases are different. In that case, the Petitioner was a licensee in respect of three I.M.F.L. "OFF" shops in the district of Balasore for the years 1997-98, 1998-99 and 1999-2000. For each of the three shops, an agreement was executed between the Petitioner and the Collector, Balasore which, inter alia, provided that the Petitioner will sell a minimum guaranteed quantity per month. The Petitioner submitted a representation dated 5.12.2000 for reduction of M.G.Q. for the said three shops and by order dated 26.4.2002, the Government of Orissa in the Excise Department allowed a reduction of 20% on the existing M.G.Q. for the three shops for the years 1997-98, 1998-99 and 1999-2000. Pursuant to the said order dated 26.4.2002, the Petitioner has been asked to deposit arrear government revenue amounting to Rs. 59,79,401/- towards short-drawn M.G.Q. of I.M.F.L. and Beer for the aforesaid three shops during the years 1997-98 to 1999-2000 by a demand notice dated 22.7.2003 issued by the Superintendent of Excise, Balasore. Aggrieved, the Petitioner had filed the said writ petition.

The question that fell for consideration by this Court in that case was whether short-drawn M.G.Q. of any month can be made good by lifting of foreign liquor in excess of the M.G.Q. in any other month by the licensee under Rule 6A of the Rules, 1989. This Court held that under Rule 6A of the Rules, 1989 the licensee is not entitled to adjust the quantity of foreign liquor or beer lifted by him in the previous month in excess of the M.G.Q. against the short-drawn M.G.Q. of subsequent months and has to pay duty on the short-drawn M.G.Q. of the subsequent months and the hardship or inconvenience caused to the licensee cannot be a plea for waiving such liability of the licensee to pay the duty on account of short-drawn M.G.Q. of the previous months.

20. In the case at hand, the question is whether the Government is vested with any power to enhance the M.G.Q. mentioned in the licence after issuance of licence for a particular period.

21. The contention of the Petitioner is that not a single licensee has lifted the I.M.F.L. and Beer as per the enhanced target and No. action has been taken against those licensees who had not lifted the enhanced M.G.Q. Therefore, action taken against him alone amounts to discrimination. Though the opposite parties-authorities accepted such allegation of the Petitioner it is submitted that the Petitioner cannot claim negative equality. Law is well settled that Article 14 of the Constitution does not envisage negative equality. At the same time, the State Authorities cannot adopt the method of pick and choose.

22. Law is also well settled that every action of the State and its instrumentality should be fair, legitimate and above board and without any affection or aversion. (See Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, ; E.P. Royappa Vs. State of Tamil Nadu and Another, and State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others,).

23. In view of our findings/observations made in the preceding paragraphs, we are of the view that the demand notices dated 20.07.2009 (Annexure-8), dated 28.10.2010 (Annexure-16) and the letter dated 12.10.2010 (Annexure-15) are not sustainable in law and accordingly, they are quashed.

24. In the result, the writ petition is allowed. No order as to costs.

V. Gopala Gowda, C.J.

25. I agree.