**(1990) 07 KL CK 0082**

**In the High Court Of Kerala**

**Case No :** W.A. No. 553 of 1987

State of Kerala and Others — APPELLANT

Vs

M/s. Mc Dowell and Co. Ltd. — RESPONDENT

**Date of Decision :** 18-07-1990

**Acts Referred:**
Kerala Distillery and Warehouse Rules, 1968 — Rule 55
Kerala Rectified Spirit Rules, 1972 — Rule 11

**Citation :** (1990) 2 KLJ 326

**Hon'ble Judges :** V.S. Malimath, C.J;T.L. Viswanatha Iyer, J

**Bench :** Division Bench

**Advocate :** V.P. Seeminthini, for the Appellant; B.S. Krishnan, for the Respondent

**Final Decision :** Dismissed

# Judgement

Malimath, C. J.

1. This appeal is by the State Government, Board of Revenue and the Circle Inspector of Excise, challenging the judgment of the learned single Judge in O.P. No. 9755 of 1985, which is the common judgment in O.P. No. 4498 of 1983 as well. The relevant facts necessary for the disposal of this case may briefly be stated as follows: The respondent, M/s. Mc. Dowell & Company Limited, Varanad, Shertallai, Alleppey District, is a company engaged in the manufacture of liquor at their distillery at Varanad, Shertallai. They function under the relevant licence issued under the relevant provisions of the Act and the rules made thereunder. In connection with their manufacturing activities, the respondent imported certain quantities of rectified spirit from the State of Maharashtra during the years 1980-81, 1981-82 and 1982-83 under a permit, presumably under rule 4 of the Kerala Rectified Spirit Rules, 1972 (hereinafter referred to as the Rules). When the imported rectified spirit was actually measured on its arrival in Kerala, it was found that there was excess shortage in transit above the admissible quantity of wastage prescribed by the relevant rules. The appellants demanded duty on excess wastage as per Ext. P2. A request made for not levying duty on excess

wastage on an earlier occasion appears to have been rejected as per Ext. P4 dated 25-5-1984 on the ground that there is no merit in the request. It is in this background that the respondent presented O.P. No. 9755 of 1985 challenging. Exts. P2 and P4 and further praying for declaring that rule 7 (5) of the Kerala Foreign Liquor (Compounding Blending and Bottling) Rules, 1975 and Rule 11 of the Kerala Rectified Spirit Rules are contrary to the provisions of the Kerala Abkari Act and beyond the rule making power of the Government u/s 29 of the said Act. The learned single Judge by his Judgment dated 25-11-1986 allowed the writ petition and quashed Exts. P2 and P4 and directed the Board of Revenue to re-consider the entire matter with notice to the respondent and to pass final orders within a period of two months from the date of receipt of the copy of the judgment, It is the said judgment that is challenged in this appeal. The learned single Judge has taken the view that the appellants were not able to justify the levy of duly on excess wastage of rectified spirit beyond the admissible limit on the strength of any statutory provision. On behalf of the appellants, it appears that section 6 of the Abkari Act and rule 7 (5) of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975 and rule 55 (4) of the Kerala Distillery and Warehouse Rules were invoked. The learned single Judge has come to the conclusion that none of these provisions authorise the levy of duty on excess wastage.

2. The principal submission of Smt. Seemanthini, the learned High Court Government Pleader, appearing for the appellants is that rule 11 of the Rules is the relevant provision which authorises levy of duty on excess wastage and not the various provisions pressed into service before the learned single Judge. We shall briefly advert to the relevant provisions of the Abkari Act, in this connection.

3. Section 3 (10) of the Abkari Act defines ''liquor'' to include spirits of wine, methylated spirits, spirits, wine, toddy, beer and all liquid consisting of or containing alcohol Rectified spirit being admittedly liquor consisting of alcohol it answers the definition of the expression ''liquor'' in section 3 (10) of the Act. Section 3 (16) of the Act defines the word ''import'' as meaning to bring into the State''. Sub-section (1) of section (6) provides that "No liquor or intoxicating drug shall be imported unless the permission of the Government or any officer authorised by the Government in this behalf is obtained for the importation of such liquor or intoxicating drug and unless the duties, taxes, fees, and such other Sums as are due to the Government under this Act, in respect of such liquor or intoxicating drug, have been paid". Section 17 of the Act authorises levy of duty of excise or luxury tax or both, as may be directed by the State Government on liquor or intoxicating drugs permitted to be imported u/s 6 of the Act. By Notification SRO. No. 60/61 issued by the Government in exercise of the powers conferred on it by section 17 of the Cochin Abkari Act, the Government has directed that duty shall be levied on the different kinds of liquors specified therein which are manufactured in the area where the Act is in force or manufactured elsewhere in India and imported into the said area by land or under bond by sea, at the rates mentioned against each kind of liquor. Indian

 

made rectified spirit is at item (2) for which the rate of duty prescribed is Rs. 15.50 per proof litre. Though this notification was issued under the Cochin Abkari Act and therefore was in force only in Cochin area, the same has been extended for the entire State by the Cochin Abkari (Extension and Amendment) Act 1967 (Act 10 of 1967).

4. u/s 29 of the Abkari Act, the Kerala Rectified Spirit Rules 1972 have been promulgated. Rule 4 of the Rules provides that no rectified spirit shall be imported except under a permit issued by the Assistant Excise Commissioner of the Excise Division to which it is to be imported. Rule 9 of the said rules provides that all spirits purchased from a distillery in the State or imported from outside, under bond without prior payment of duty, shall forthwith be taken to the bonded spirit store licensed for the purpose and produced before the Excise Inspector for verification or the Excise Inspector informed, of the arrival of the consignment and requested to verify it. Rule 10 prescribes the mode of verification of consignment under bond. It provides as follows:

10. Mode of verification of consignment under bond:-

(1) On receipt of an intimation under rule 9, the Excise Inspector-in-charge shall verify the consignment as provided for in the Kerala Distillery and warehouse Rules, 1968, and enter the result of verification in the Register in Form D 31 appended to those rules.

Rule. 11, which is the material provision for our discussion may be extracted as follows:

11. Wastage in Transit (1) The Excise Inspector-in-charge of the bonded spirit store shall verify whether the wastage of spirit in transit is within the limits prescribed in the Kerala Distillery and Warehouse Rules, 1968, and if such wastage is found to be in excess of such limits, duty at the rate applicable to rectified spirit shall be levied on the quantity of spirit wasted in excess of such limits.

(2) The Excise Inspector-in-charge of the bonded spirit store who detects excess wastage of spirit under sub-rule (1) shall serve a demand notice on the licensee with instructions to remit the amount of duty payable by him under that sub-rule within 14 days of the receipt of the notice and if the licensee fails to remit the duty within that period, the Excise Inspector shall withhold further application from the licensee for the release of spirit from the store.

(3) Any licensee objecting to the levy of duty under sub-rule (1) may prefer an appeal to the Commissioner through the Assistant Excise Commissioner of the division together with a copy of the demand notice against which the appeal is preferred and a treasury receipt in token of having paid the amount of duty levied.

(4) No appeal which is not accompanied by the treasury receipt shall be entertained.

This provision makes it clear that wastage that has occurred in transit has to be examined in the light of the Kerala Distillery and Warehouse Rules, 1968. If on such verification it is found that the wastage is in excess of the limits prescribed duty at the rates applicable to rectified spirit has to be levied on quantity of spirit found wasted in excess of the limits prescribed. In other words, there is a presumption that the quantity of rectified spirit which is wasted in transit in excess of the permissible limits has in fact been imported into the State, thus attracting duty leviable.

5. As the Kerala Distillery and Warehouse Rules, 1968 are made applicable to the determination of wastage in transit of the rectified spirit, we shall briefly examine the relevant provisions of the said rules. Rule 55 of Part 1 of the Kerala Distillery and Warehouse Rules which is relevant for our purpose reads as follows :

55. Allowances for wastage.- (1) An Allowance made for the loss in transit by leakage or evaporation or other unavoidable causes of spirits transported or exported under bond in wooden casks or receptacles shall be at the rate of 1% for a journey every of 400 k.m. or part thereof subject to a maximum of 4% for the whole journey.

(2) If the spirits are transported or exported in metallic receptacles, tanker lorries or plastic/polythene containers, the allowance made for loss in transit by leakage and evaporation or other unavoidable causes shall be at the rate of O. 1% for a journey of every 400 k.m. or part thereof subject to a maximum of 0.5% for the whole journey.

Provided that if the actual loss is less than the loss as computed under sub-rule (1) or (2), allowance shall be made only for the actual loss;

(3) The allowance to be made under this rule shall be determined by deduction from the quantity of spirit despatched from the distillery or warehouse, the quantity received at the place of destination, both quantities being treated in terms of London Proof Litres and shall be calculated on the quantity contained in each consignment.

(4) If the report of the officer by whom a consignment of spirit transported or exported has been gauged and proved on arrival at its destination shows that loss has occurred in transit to a greater extent than that prescribed by sub-rules, 1 to 3, the distillery or warehouse keeper shall pay duty at the tariff rate, for the time being in force, on so much of the deficiency as is excess of the allowance to prescribed:

Provided that if proved to the satisfaction of the Commissioner that such deficiency could not have been prevented by the exercise of proper care and precaution, and that the spirits could not have passed into consumption, the duty levied on such deficiency shall be refunded. The Commissioner''s decision shall be final.

Rule 55 of the Kerala Distillery and Warehouse Rules thus provides a scheme for determining whether the wastage of spirit in transit is within the prescribed limits. If the wastage is in excess of the limits prescribed by rule 55, duty at the rate applicable to rectified spirit shall be levied on the quantity of spirit wasted in excess of such limits as provided under rule 11 of the Rules. The proviso to Rule 55 of the Kerala Distillery and Warehouse Rules enables the importer to satisfy the Commissioner that such deficiency could not have been prevented by the exercise of proper care and caution and the spirit could not have passed into consumption. If the importer is able to satisfy the Commissioner in these respects, the excess wastage shall not attract liability to pay duty; The proviso to rule 55 of the Kerala Distillery and Warehouse Rules being an integral part of the schema prescribed for assessing the wastage, the same applies to wastage in transit of rectified spirit as governed by the Kerala Rectified Spirit Rules. Rule 11 of the said rule lead along with the scheme regarding determination of excess wastage contained in rule 55 of the Kerala Distillery and Warehouse Rules, make it clear that if the wastage is in excess of the limits prescribed, the initial presumption is that the quantity of rectified spirit found to be in excess of the permissible limits was imported into the State of Kerala thus attracting liability to duty. It is a presumption which can be rebutted by the importer by placing materials before the Commissioner to satisfy him that such deficiency could not have been prevented by the exercise of proper care and precaution and that the rectified spirit could not have passed into consumption. So understood, it is clear that the levy of duty on excess wastage is not on the rectified spirit not actually imported in to the State of Kerala if the importer is not able to produce materials to the satisfaction of the Commissioner as provided in the proviso to rule 55 of the Kerala Distillery and Warehouse Rules, a reasonable inference can legitimately be drawn to the effect that the quantity of excess wastage of rectified spirit which has been admittedly put in transit for import into Kerala, has in fact arrived in the State of Kerala. The rules only prescribe the rules of evidence in regard to the proof of actual import of wastage and the importer has adequate opportunity of placing relevant materials which are within his knowledge to satisfy the authorities about the factors mentioned in the proviso to rule 55 of the Kerala Distilleries and Warehouse Rules. As already stated, in our opinion, the rules authorise levy of duty only on rectified spirit imported into the State of Kerala. Levy of duty on the same is fully authorised by section 6 (1) read with section 17 of the Kerala Abkari Act. Rule 11 of the Kerala Rectified Spirit Rules, 1972 in our opinion, is just and reasonable and is intended to advance the object of the Act. it is therefore intra vires the Act. We therefore find it difficult to agree with the view taken by the learned single Judge that there is no statutory provision authorising levy of duty on excess wastage of rectified spirit in transit in excess of the permissible limits.

6. Though the respondent has challenged the vires of rule 7 (5) of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975, as the same is not applicable we consider it unnecessary to examine the said contention. So far as the impugned order Ext. P2 is concerned, we find that the same has not been

 

passed after a consideration of all the relevant factors. The respondent has also not been afforded an opportunity to satisfy the Commissioner that the excess wastage if any does not attract levy of duty. As levy of duty has not been made on a proper consideration of all the relevant materials and applying the relevant provisions of the Rules, the impugned order is liable to be quashed and the matter remitted for fresh disposal by the Board of Revenue though for reasons different from those assigned by the learned single Judge in his judgment. We do so. The appeal is accordingly dismissed with the above observations. No costs.