
(2008) 05 CAL CK 0011
In the Calcutta High Court
Case No : F.M.A. No. 280 of 2008

State of West Bengal

APPELLANT

Vs

Shaw Wallace and Company Limited

RESPONDENT

Date of Decision : 09-05-2008

Acts Referred:

Citation : (2008) 2 CHN 935

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Tapabrata Chakraborty, Addl. GP and Kumaresh Dalal, for the Appellant; Soumendra Chandra Bose and Pompey Bose and R.N. Bajoria, Amicus Curiae, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Respondent was engaged in manufacturing of foreign liquor commonly known as Indian Made Foreign Liquor (hereinafter referred to as "IMFL"). For the purpose of manufacturing of IMFL the respondent is obliged to pay excise duty under the Bengal Excise Act, 1909. However, in case they wanted to export IMFL to any other state outside the West Bengal or abroad they were supposed to pay a levy by way of fee to the State Government which is known as "Export Pass Fee". The respondent made grievance with regard to imposition of "Export Pass Fee" as according to them since they were paying excise duty on manufacture of IMFL and they were also paying necessary taxes and/or statutory outgoings on such manufacture the State was not entitled to put additional burden on them by way of "Export Pass Fee" which was unconstitutional.

2. Identical issue was dealt in the case of Phipson & Co. Limited v. State of West Bengal Matter No. 775 of 1970 where the learned Single Judge by judgment and order dated July 12, 1974 held that such imposition was not valid in law as a fee could only be collected in exchange of service rendered to the manufacturer. Since no service was rendered to the licensee by the State the learned Single Judge observed, it cannot be, therefore, be said that the principles of "quid pro

quo" has been followed in respect of "Export Pass Fee" realised by the licencing authority.

3. The State preferred an appeal from the decision of the learned Single Judge in Phipson & Co. Limited case. They, however, allowed the said appeal to be dismissed for default.

4. Identical issue came up for consideration before another learned Single Judge in C.R. No. 2257(W) of 1974 (Carew & Co. Limited v. State of West Bengal) when His Lordship following the decision in the case of Phipson & Co. Limited quashed imposition of "Export Pass Fee" vide judgment and order dated December 6, 1977.

5. When Shaw Wallace was imposed the "Export Pass Fee" for export of IMFL to other State they filed the instant writ petition being W.P. No. 3387(W) of 1997. The learned Single Judge followed the earlier two decisions in the case of Phipson & Co. Limited (Supra) and Carew & Co. Limited (Supra) and allowed the writ petition by quashing imposition of "Export Pass Fee". Hence, this appeal by the State.

6. The issue involved before us is not only important but also intricate. It would involve judicial review of the policy of the State. Hence, considering the importance of the matter we requested Mr. R.N. Bajoria a living authority on the subject to assist us as amicus curiae. Mr. Bajoria kindly agreed to do so and rendered to us immense assistance.

7. The appeal was heard by us on the above mentioned dates.

8. Mr. Tapabrata Chakraborty, learned Additional Government Pleader, contended as follows:

The State was entitled to impose fee not only for the purpose of service rendered to the licensee but also for Regulation of the manufacture of IMFL so that they could recover the cost of infrastructure additionally maintained to regulate such export. Mr. Chakraborty heavily relied on a decision of this Bench in the case of Shaw Brothers (Wine) Limited v. State of West Bengal and Ors. reported in 2007 CWNPage 783 wherein after considering the earlier decisions of the Apex Court on the subject we held that to impose a fee there lies a responsibility of the State to render service to the licensee. However, such service may not be direct. Indirect rendering of service could be proved from the nexus between the fee and the services rendered by the State.

9. Paragraph 16 of the said decision being relevant herein is quoted below:

On a combined reading of the cases cited before us and discussed above we would find that imposition of fee for reimbursement of the proportionate expenses for maintaining infrastructure at the warehouse would be permissible only when there would be quid pro quo. In case it is proved that such fee has a co-relation and nexus with the services rendered such imposition is lawful and

cannot be said to be ultra vires the Act of 1909 of the Constitution.

10. Mr. Chakraborty lastly contended that establishment of a co-relation was enough to impose a fee. Since they, despite manufacture of IMFL in the State, wanted to export the same outside the State the Government would have to maintain a strict vigil to keep track of the said manufacture as well as export and for that they would be entitled to impose "Export Pass Fee". In support of his contention Mr. Chakraborty relied on the following decisions of the Apex Court:

- (i) State of Tripura and others Vs. Sudhir Ranjan Nath,
- (ii) Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others,
- (iii) Secunderabad Hyderabad Hotel Owners Association and Others Vs. Hyderabad Municipal Corporation, Hyderabad and Another,
- (iv) A.P. Paper Mills Ltd. Vs. Government of A.P. and Another,
- (v) Sona Chandi Oal Committee and Others Vs. State of Maharashtra,
- (vi) The State of West Bengal Vs. Kesoram Industries Ltd. and Others,
- (vii) Vijayalashmi Rice Mill and Others Vs. The Commercial Tax Officers, Palakol and Others,
- (viii) 2004 4 SC 537 (State of Punjab and Anr. v. Devans Modern Brewaries Ltd. and Anr.)

11. On the issue that the judgment in the case of Phipson and Co. was appealed against and thereafter not proceeded with, Mr. Chakraborty contended that such fact was of no consequence as such proposition of law could again be adjudicated in this appeal. In this regard he relied on the decision in the case of State of Maharashtra Vs. Digambar, .

12. Mr. Soumendra Chandra Bose, learned Senior Counsel appearing for the respondent while opposing the appeal contended that once the respondent paid the excise duty and the State machinery collected all necessary taxes and outgoings on the eventuality of such manufacture imposition of "Export Pass Fee" without any corresponding service being rendered was unconstitutional. Mr. Bose, further contended that vigil and control on manufacture were already there by different taxing authorities. Hence, no further vigil and/or control were required to be made. In any event for maintaining such vigil or control the State could not impose any fee on the manufacturer. Mr. Bose further contended that it was obligatory on the part of the State to demonstrate why such fee was levied as and by way of regulation. Unless the State was successful in doing so they were not entitled to call it as regulatory. Mr. Bose further contended that as per the Schedule of the Constitution the State was entitled to impose fee. However, they must render service in exchange of such imposition.

13. Distinguishing our judgment in the case of Shaw Brothers (Wine) Limited (Supra) Mr. Bose contended that in the said case exclusive privilege was

extended to the warehouse keepers. Here no privilege was given to the manufacturer. No Regulation was made by the State. Hence, they were not entitled to charge any fee. He relied on the Apex Court decision in the case of Indian Mica Micanite Industries Vs. The State of Bihar and Others, . Mr. Bose also drew our attention to various rules including Rules 22 and 53A of the Excise Rules to show that such imposition was not within the authority of the State.

14. Mr. Bose further contended that State could not show why such fee was regulatory. In absence of any proof such fee was liable to be quashed. Mr. Bose further contended that the respondent neither enjoyed any privilege by exporting IMFL outside the State or was enjoying any service being specially rendered by the State for such export. There was no obligation on the part of the State to regulate such export which could entitle them to charge the fee on the ground of such regulation. In this regard Mr. Bose cited the Apex Court decision in the case of Corporation of Calcutta and Another Vs. Liberty Cinema, .

15. Mr. Bose in support of his contentions also cited the following decisions:

(i) 1991 Volume - II CHN Page 264 (Bethuadahari Regulated Market Committee v. Tapan Kumar Saha and Ors.)

(ii) Dilharshankar C. Bhachech Vs. Controller of Estate Duty, Ahmedabad,

(iii) 2004 4 MLJ 206 (State of Tamil Nadu v. Tamil Nadu South Indian Sugar Mill Association (Tamil Nadu).

16. Mr. R.N. Bajoria, learned senior Counsel, while making his submission contended that under List-II of the 7th Schedule as per Entry 8, 51 and 66 the State was entitled to impose fee and/or duty on IMFL. If it was a "duty" it might not have any nexus or co-relation with any service rendered or regulation. It could not be questioned on the reasonableness also. It could be levied on happening of the taxable event. However, in case of "fee" co-relation or nexus with the service provided or the expenditure for Regulation should be there. Mr. Bajoria contended that a "tax" also could be regulatory. Primary approach of the State in imposing such "tax" or "fee" should be a guiding factor. Mr. Bajoria referred to the latest Apex Court decision in the case of Calcutta Municipal Corporation and Others Vs. Shrey Mercantile Pvt. Ltd. and Others, and contended that all earlier decisions on the subject issue were considered by the Apex Court and the Apex Court in this judgment summarised the test required for the purpose of interpreting a burden as to whether it was a "tax" or a "fee". The relevant extract of the Apex Court decision is quoted below:

According to dictionary meaning, a charge or fee, if levied for the purpose of raising revenue under the taxing power is a "tax". Similarly, imposition of fees for the primary purpose of "regulation and control" may be classified as fees as it is in the exercise of "police power", but if revenue is the primary purpose and Regulation is merely incidental, then the imposition is a "tax". A tax is an enforced contribution expected pursuant to a legislative authority for the purpose

of raising revenue to be used for public or Governmental purposes and not as payment for a special privilege or service rendered by a public officer, in which case it is a "fee". Generally speaking, "taxes" are burdens of a pecuniary nature imposed for defraying the cost of Governmental functions, whereas charges are "fees" where they are imposed upon a person to defray the cost of particular services rendered to his account. 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, it may be relied upon as a concept to bring out the difference between "a fee" and "a tax". 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". 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. 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, 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 a 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.

17. Mr. Bajoria contended that impugned imposition by the State could be put to test in the guideline framed by the Apex Court in the case of Calcutta Municipal Corporation (Supra) to get a positive answer on the issue. He, however, contended that on a combined reading of the pleadings filed before the learned Single Judge so compiled in the Paper Book it would not be proper for the Court to come to a definite finding whether "Export Pass Fee" was lawfully imposed or not as the materials brought by the parties before the learned Single Judge through the pleadings were not enough to decide the issue.

18. The law on the subject is well-settled. We have discussed the law in the case of Shaw Brothers (Wine) Limited (Supra). We have also quoted the relevant paragraph hereinbefore. We, however, add that the primary approach of the State in imposing the burden is important to find out whether such imposition was "fee" or "tax". If the primary purpose of imposition is to regulate or to render any service such charge can be called as a "fee" and not a "tax" even if it produces revenue for the Government. For imposition of "fee" establishment of nexus is a must.

19. Let us now apply the law in the present case. We have carefully perused the pleadings used before the learned Single Judge. We have searched in vain

materials to examine the imposition. We are unsuccessful therein.

20. If we look at the writ petition we find the same a cryptic one.

21. The writ petition proceeds on the basis that since in case of Phipson & Co. Limited and Carew & Co. Limited the learned Single Judge quashed imposition of Export Pass Fee such benefit must be extended to the writ petitioners. If we examine the grounds mentioned in the said writ petition we would find that imposition of export pass fee was illegal in view of the decision in the case of Phipson & Co. Limited and Carew & Co. Limited. No independent challenge was thrown by the writ petitioner being the appellant herein to such imposition. The learned Single Judge merely followed the earlier two decisions of the Single Bench and allowed the writ petition.

22. Let us now consider the affidavit in opposition filed by the State. A shortest possible affidavit was filed on behalf of the Excise Authority. The said affidavit was nothing but a bare denial of the allegations. The said affidavit also referred to the appeal preferred by the State in case of Phipson and the order of stay granted therein.

23. In the affidavit-in-reply above allegation was controverted by the appellant by contending that the said appeal stood dismissed and the interim order stood vacated.

24. On such basis the learned Single Judge should not have allowed the writ petition merely following the other two Single Bench decision specially when it involved a policy of the State.

25. When the State preferred appeal in the application for stay they tried to bring on record some relevant facts annexing the relevant notifications. Those were also not enough to come to a definite conclusion with regard to the point in issue.

26. The writ petition in the case of Phipson or Carew was not produced before the learned Single Judge or before us. On perusal of both the judgments we also do not find much materials to re-examine the ultimate decisions of Their Lordships. It is true that on identical issue two writ petitions were allowed earlier. When the third writ petition was brought before the learned Single Judge His Lordship before relying on the earlier two judgments should have independently examined the issue. We are constrained to observe that materials are not enough in the case before us wherefrom we can come to a logical conclusion on the issue.

27. When a writ petitioner comes to Court and prays for an order that such identical benefit should be extended to him he is to show independently that he is entitled to such an order and he is similarly circumstanced with the other writ petitioner. In the instant case the second test might have been successful. However, in absence of the first test being positive the writ petitioner was not entitled to any order.

28. The appeal thus succeeds. Order under appeal is set aside. Writ petition is dismissed.

29. We abundantly make it clear that we express no opinion with regard to the validity of imposition of Export Pass Fee and keep it open to be decided in an appropriate proceeding in case appropriate and enough materials are brought us to come to a logical conclusion on the issue.

30. The appeal is disposed of accordingly without any order as to costs. Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

I agree.