
(2005) 04 AHC CK 0081

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 906 of 1995 (M/B)

Upper Ganges Sugar and Industries Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 11-04-2005

Acts Referred:

Constitution of India, 1950 — Article 141, 226

Uttar Pradesh Excise (Amendment) Act, 1920 — Section 28, 29, 4(2)

Uttar Pradesh Excise Act, 1910 — Section 2(12), 2(14), 2(19), 2(6), 24

Uttar Pradesh Excise Rules, 1910 — Rule 12, 33, 633, 775

Citation : (2005) 3 AWC 2545

Hon'ble Judges : R.K. Agrawal, J;Prakash Krishna, J

Bench : Division Bench

Advocate : R.K. Srivastava and R.M. Saggi, for the Appellant; Sudhir Agrawal, Addl. A.G., S.P. Kesarwani and S.C., for the Respondent

Final Decision : Allowed

Judgement

R.K. Agrawal , J.—The present writ petition had earlier been allowed by the Division Bench of which one of us (R.K. Agrawal, J.) was a member vide judgment and order dated 24.3.1999 which order has been set aside by the Hon'ble Supreme Court in the Civil Appeal No.6369 of 2000 filed by State of U.P. and others, vide order dated 13.11.2000, on the ground that the contentions raised by the appellant herein have neither been considered nor dealt with by the High Court. Pursuant to the direction given by the Apex Court the present writ petition is being heard again.

2. By means of the present writ petition filed under Article 226 of the Constitution of India, the petition, M/s Upper Ganges Sugar and Industries Ltd., seek the following relief:-

a) to issue an appropriate order or direction to declare Sections 4 and 24 of the U.P. Excise Act 1910 as ultra vires the Constitution so far as they provide that rectified spirit is foreign liquor.

b) to issue an appropriate order or direction to declare the rule 12 of U. P. Excise Rules beyond the rule making power of the State Government under the provisions of U.P. Excise Act, 1910.

c) to issue an appropriate order or direction to declare that Notification No. 6121-The assessee-XIII-275-5-58 dated Decemblers 3, 1960 and Notification No. 1275-The assessee-XIII-508-62 dated March 30. 1962 issued by the State Government under sub-section (2) of Section 4 and Section 28 and 29 of the U.P. Excise act, 1920 as unconstitutional illegal and beyond the power and jurisdiction of the State Government.

d) to issue an appropriate writ, order or direction in the nature of certiorari to quash the order No. 860 Nau-94 95/Aa.Ni.Keraia 20 May 1995 issued by the Excise Commissioner, opposite party No. 2, U.P. and the order No.:32-Su.Aa/95.96 dated 30.5.1995 issued by the opposite party No. 6 as contained in Annexure No. 21 and 22 respectively.

e) to issue an appropriate writ, order or direction in the nature of mandamus directing the State Government and its functionaries not to proceed to recover any duty on rectified spirit from the petitioner as per the orders dated 20.5.1995 and 30.5.1995 as contained in Annexures 21 and 22 respectively.

f) to issue any other appropriate writ order or direction as the; nature and merit of the case may admit of, may kindly also be passed in favour of the petitioner.

g) to issue an and, therefore, interim order in favour of petitioner.

h) to allow the writ petition with cost."

3. Briefly stated, the facts giving rise to the present petition are as follows:-

The petitioner is a public limited company incorporated under the provisions of the Companies Act, 1956 and has its registered office at 9/1, R.N. Mukherjee Road, Calcutta. It is engaged in manufacture and sale of white crystal sugar, industrial alcohol and rectified spirit. It has its sugar factory and distillery unit in Seohara, in the district of Bijnor within the State of U.P. For running the sugar factory as also the distillery and for carrying on the manufacturing process therein, the petitioner Has been granted requisite licence by the Central Government under the provisions of the Industries (Regulation and Development) Act, 1951 (hereinafter referred to as "the Apt"). In the distillery, the petitioner manufactures industrial alcohol and rectified spirit. According to the petitioner, it does not produce any potable liquor or country liquor or Indian made foreign liquor. The State of U.P. or its Department of Excise has not granted any licence to the petitioner for manufacture of potable liquor in its distillery. The rectified spirit; produced in the petitioner's distillery is unfit for human consumption. The percentage of ethanol alcohol contents of rectified spirit by volume is riot less than 94.68%. It is alleged that even though the State of U.P. is not empowered to legislate in the matter of manufacture of rectified spirit yet it exercises supervisory control over the manufacture and storage etc.

of rectified spirit and for this unless a permit is issued by the State Government, the sale of rectified spirit either in the State of U.P. or outside is not permissible. The petitioner not only sells rectified spirit produced by it within the State of U.P. but is also export it to other States in the country. In the case of export to other States in the country the intending importer obtains import permit from that State to which rectified spirit is to be exported from the State of U.P. and after obtaining the import permit, the intending importer approaches the State Government for issue of permit for exporting the rectified spirit to his State. One M/s Indian Sugar and General Industries Export. Import Corporation Ltd., respondent no.7, obtained permits from the Excise Department of the State of Kerala for importing rectified spirit to that State. By means of import permit dated 20.7.1993 M/s T.K. Balon and P.L. James Contractors of A.S. Group No.I/93-94 were allowed to import 6,720 BL (bulk litres) of rectified spirit. Under the import permits dated 14.10 .1993 and 16/18. 10.1993 issued by the Excise Department of the State of Kerala, M/s P.B. Suresh Babu and M/s K.N. Askan were allowed to import 6,720. BL and 16,000 BL rectified spirit from the petitioner company through M/s India Sugar and General Industries Export and Import Corporation Ltd. Against the import permit dated 20.7.1993, the Excise Commissioner of U.P. issued two order No. 7140/Nau-92-93/Alcohol Niryat/Kerala dated 26.8.1993 permitting; the export of 6,720 BL of rectified spirit by the permit holder and another order No.7592/Nau-92-93/Alcbhol Niryat/Kerala dated 30.8.1993 were issued by the Excise Commissioner of U.P. permitting export of rectified spirit. Vide order No. 7592 dated 30.8.1993, the Excise Commissioner. U.P. granted permission for export of rectified spirit under different export permits in one tank Under order No. 7140/Nau-92-93/Alcohol Niryat/Kerala dated 26.8.1993 permit was granted for export of 6,720 BL of rectified spirit to the State of Kerala. By: another Order No. 9941/Nau-92-93/Alcohol Niryat/Kerala dated 21.10.1993, the! Excise Commissioner, U.P., granted permit for export of 6,720 BL of rectified spirit to M/s P.B. Suresh Babu and 16,000 BL of rectified spirit to M/s K.N. Ashokan. For export of the rectified spirit from the State of U.P., the exporter has to pay an export pass fee at the rate determined and notified by the State Government under the U.P. Excise Import, Export Transport and Possession of Denatured Spirit Rules, 1931, as amended from time to time. On the deposit of export pass, fee, the Excise Department of the State issues a permit for export of rectified spirit from the distillery. In this connection, the Excise Inspector petitioner"s distillery at Seohara issued two export pass No. 419 dated 3.9.1993 in favour of M/s T.K. Balan and P.L. James and pass Nos. 557 and 558 dated 6.11.1993 to M/s P.B. Suresh Babu and M/s K.N. Ashokan. Against the export permit No. 7592 dated 30.8.1993, 7,280 BL (6,916 A.L.(alcoholic leter) of rectified spirit was exported to M/s K.N. Ashokan and 6,720 BL (6,384 AX.) of rectified spirit was exported to M/s P.B. Suresh Babu. The entire quantify measuring 14,000 BL (13,300 A.L.) was dispatched by tankar No. HR 26 A 2972. Unfortunately, the said tanker containing rectified spirit to the State of Kerala met an accident at Gurgaon in the State of Haryana at about 7.30 p.m. on 7.11.1993. A First Information Report in respect of the

accident was lodged with P.S. Bilaspur, district Gurgaon, Haryana. The information regarding the accident was telegraphically sent to the District Magistrate, Bijnor, the District Excise, officer, Bijnor; the Deputy Excise Commissioner, Moradabad and the Excise Commissioner, U.P., Allahabad. Similar telegrams were also sent to the other State authorities. On 9.11.1993 on behalf of the petitioner an application was handed over to the District Excise Officer, Bijnor requesting him to depute Excise Inspector for inspection of the damaged tanker and the site of the accident for assessing the loss of rectified spirit that had leaked out due to accident. As directed, the Deputy Excise and Taxation Commissioner, Gurgaon, Haryana was contacted on 11.11.1993 for extending necessary help and completing necessary formalities in the matter. Alongwith the letter dated 10.11.1993 the petitioner company also handed over a letter from the District Excise Officer, Bijnor to the Deputy Excise and Taxation Commissioner, Gurgaon, Haryana stating that he should supervise the transfer of rectified spirit from the accidented tanker to another tanker. He deputed an Excise Inspector of his State to Supervise the transfer of rectified spirit from the accidented tanker to another tanker No. HR 26 A 0972. "The Excise Inspector of Haryana State got all the five seals opened of the tanker No. HR 26 A 2972 in his presence and after getting the rectified spirit transferred to another tanker No. HR 26 A 0972 and sealed it. As rectified spirit had leaked out from the tanker after the accident only 6,690 A.L. alcohol was left for transmission. This much quantity of alcohol was delivered to M/s P.B. Suresh Babu against pass No. 567 dated 6.11.1993 for 6,720 BL of rectified spirit. So far quantity of rectified spirit exported by M/s K.N. Ashokan was concerned, it could not be delivered as there was no rectified spirit left for being, delivered to them. For the quantity which was lost due to accident, P.D. Form 25 received from Kerala did not mention the receipt of rectified spirit. After a lapse of about 11 months, the petitioner received a letter dated 20.10.1994 from the Excise Inspector posted at Seohara Distillery for recovering the excise duty from the petitioner on rectified spirit which was exported to the State of Kerala in respect of which P.D. Form 25 received from Kerala did not mention any receipt of the quantity lost due to accident under permit No. 954I dated 21.10.1993 in favour of M/s K.N. Ashokan. Likewise, the excise duty at the same rate was liable to be recovered from the petitioner of the rectified spirit export to the State of Kerala vide export permit No. 7140 dated 26.8.1994 as P.D. Form 25 in respect of the same had not been received back from the State of Kerala after verification. With regard to the recovery of the State duty on rectified spirit against excise pass P.D. Permit No. 954I, the Excise Inspector stated that as per his information, rectified spirit measuring 6,519 A.L. transported in the tank met with an accident for which in P.D. Form 25 receipt of rectified spirit was not mentioned, therefore, on that much quantity of 6,913 A.L. of rectified spirit, a sum of Rs. 3,11,220/- was recoverable from the petitioner towards payment of excise duty @ Rs. 45 per A.L. Another sum of Rs. 2,84,616/- was required to be recovered from the petitioner's towards excise duty @ Rs. 45/- per A.L. on 6,324.80 A.L. of rectified spirit as P.D. Form 25 No. 419 in respect of the same had not been received back

from the State of Kerala. According to the petitioner, it approached the Excise Commissioner, U.P., Allahabad and also the Excise Inspector at its distillery at Seohara, contesting the demands made by them on the ground that the recovery of duty on rectified spirit was not justified no permissible under law and the demands to be waived. Reliance was also placed on a circular issued by the Excise Commissioner, U.P., Allahabad, dated 29.1.1981 in which it has been stated that the rectified spirit was not an excisable item under the U.P. Excise Act, 1910.

4. In the counter affidavit filed by Sri Harish Chandra Dwivedi, Assistant Excise Commissioner, Allahabad on behalf of the respondents, a case has been set up that the rectified spirit is itself potable liquor and it becomes industrial alcohol only when it is denatured or earmarked for industrial purposes. According to the respondents, this alcohol is potable irrespective of its strength and alcohol liquor of any strength if consumed indiscriminately, it is injurious to health. According to the respondents, due to pungent taste of alcohol it is sold for human consumption on strength not beyond 42.8 V/V but it is absolutely wrong that the spirit of 94.6 V/V cannot be consumed. It has been stated that the State Government has absolute power to legislate in respect of rectified spirit which is per se potable. According to the respondents, apart from charging export pass fee, the State Government allows transportation of spirit under general and special bond by which the exporter undertakes to transport the spirit to its destination in its destination in its entire bulk and also binds himself to pay damages to the State Government if any loss of spirit occurs in transit excluding permissible limit. The contractual liability is binding upon the transporter as the contract is legal, for consideration and for lawful purpose and the bond is executed by a person competent to contract with his free consent. Even if the tanker carrying the rectified spirit met with accident, that does not frustrate the contract between the contractor and the Government and the bond does not stand discharged. As in the present case, during the internal audit of the petitioner distillery by the Audit Section of the Excise Office, it was pointed out that the P.D. Form 25 and 26 were not received back from the exporting State, therefore, amount equal to excise duty on the quantity of spirit exported should be realised whereupon the demands have been raised.

5. A supplementary affidavit has been filed on behalf of the petitioner by Sri Sudama Ram Chamoli, Officer Superintendent in the distillery unit of the petitioner company, in which it has been stated that P.D. Form 25 has been received back by the petitioner and was forwarded to the Excise Inspector vide letter dated 25.11.1995. Thus, the contention that P.D. Form 25 has not been received back is not correct.

6. We have heard Dr. R.K. Srivastava, assisted by Sri R.M. Saggi, learned counsel for the petitioner, and Sri Sudhir Agarawal, learned Additional Advocate General, assisted by Sri S.P. Kesarwani, on behalf of the respondents.

7. The learned counsel for the petitioner submitted that the petitioner is engaged

in the manufacture and sale of rectified spirit and industrial alcohol for which the requisite licence has been issued by the Central Government under the provisions of the Act. The State of U.P. has no legislative competence to levy any excise duty on the manufacture of rectified spirit. According to him, the State Government has no legislative competence to levy any excise duty on the manufacture of rectified spirit. According to him, the State Government has only supervisory powers and can regulate the trade but that does not empower the State Government to demand duty in lieu of excise duty for the loss occurred in transit. He placed reliance upon the following decisions:

- (i) State of U.P. and Others Vs. Modi Distillery and Others,
- (ii) State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others, and
- (iii) Deccan Sugar and Abkari Co. Ltd. v. Commissioner of Excise, A.P. (2004) 1 SCC 243.

8. He submitted that in the case of Deccan Sugar and Abkari Co. Ltd. (supra) the Apex Court has held that the State legislature has no jurisdiction to levy any excise duty on rectified spirit and, therefore, the order levying the duty on wastage of rectified spirit was set aside.

9. The learned Additional Advocate General submitted that the rectified spirit manufactured and sold by the petitioner is capable of being converted into potable liquor and, in fact, it was being sent to the State of Kerala under the permit for being used as Arrack (country liquor). He, thus, submitted that under the regulatory powers vested with the State of U.P., the demand of duty on wastage/transit loss is fully justified. He placed heavy reliance on the decisions of the Apex Court in the case of Bihar Distillery and Another Vs. Union of India (UOI) and Others, He further submitted that the decision of Bihar Distillery supra still holds the field and has not been expressly overruled for which he has placed reliance on paragraph 154 of the Constitution Bench decision of the Apex Court in the case of State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another, and paragraphs 21 and 22 of the Constitutional Bench decision of the Apex Court in the case of State of Bihar and Others Vs. Shree Baidyanath Ayurved Bhawan Private Ltd. and Others, According to him, as the Bihar Distillery decision of the Apex Court still holds the field, the State is entitled to levy and demand duty on transit loss of rectified spirit.

10. Having heard the learned counsel for the parties and given our anxious consideration to the various pleas raised, we find that it is not in dispute that the petitioner is engaged in the business of manufacture and sale of rectified spirit and industrial alcohol for which the requisite licence has been issued by the Central Government under the provisions of the Act. No licence whatsoever for manufacture of rectified spirit or industrial alcohol has ever been issued to the petitioner by the Government of Uttar Pradesh.

11. In the case of Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and

Others, the seven Judges" Constitution Bench has summarised the position regarding the State's competence to levy duty on potable and non-potable liquor (industrial alcohol) as follows:-

"86. The position with regard to the control of alcohol industry has undergone material and significant change after the amendment of 1956 to the IDR Act. After the amendment, the State is left with only the following powers to legislate in respect of alcohol:

(a) It may pass any legislation in the nature of prohibition of potable liquor referable to Entry 6 of List II and regulating powers.

(b) It may lay down regulations to ensure that non-potable alcohol is not diverted and misused as a substitute for potable alcohol.

(c) The State may charge excise duty on potable alcohol and sales tax under Entry 52 of List II. However, sales tax cannot be charged on industrial alcohol in the present case, because under the Ethyl Alcohol (Price Control) Orders, sales tax cannot be charged by the State on industrial alcohol.

(d) However, in case State is rendering any service, as distinct from its claim of so-called grant of privilege, it may charge fees based on quid pro quo. See in this connection, the observations of Indian Mica case."

87. On an analysis of the various Abkari Acts and Excise Acts, it appears that various provinces/State reserve to themselves in their respective States the right to transfer exclusive or other privileges only in respect of manufacture and sale of alcohol and not in respect of possession and use. Not all but some of the States have provided such reservation in their favour. The price charges as a consideration for the grant of exclusive and other privileges was generally regarded as an excise duty. In other words, excise duty and price for privileges were regarded as one and the same thing. So-called privilege was reserved by the State mostly in respect of country liquor and not foreign liquor which included denatured spirit.

88. On an analysis of the aforesaid decisions and practice, we are clearly of the opinion that in respect of industrial alcohol the States are not authorised to impose the impost they have purported to do. In that view of the matter, the contentions of the petitioners must succeed and such impositions and imposts must go as being invalid in law so far as industrial alcohol is concerned. We make it clear that this will not affect any impost so far as potable alcohol as commonly understood is concerned. It will also not affect any Imposition of levy on industrial alcohol fee where there are circumstances to establish that there was quid pro quo for the fee sought to be imposed. This will not affect any regulating measure as such."

12. The aforesaid decision was considered by a five Judges" Constitution Bench of the Apex Court in the case of Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, wherein the Apex Court has explained the said position as

follows:-

"In *Synthetic and Chemicals Ltd. v. State of U.P.* which is decision of Constitution Bench of seven learned Judges, the question was with regard to the validity of levy on industrial alcohol. The Court held that it must accept the decision 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 being used as intoxicating or drinkable alcohol. The question, according to the Court, was whether in the garb of regulations, the legislation which is in pith and substance fee or levy which has no connection with the cost or expenses administering the regulations can be imposed purely as a regulatory measure. Judged by the pith and substance of the impugned legislation, the Court held that the levies in question could not be treated as part of regulatory measures. The Court further held that the State had power to regulate though not as emanation of police power but as an expression of the sovereign power of the State. But that power has its limitations. The court then observed that only in two cases the question of industrial alcohol had come up for consideration before this Court. One in *Synthetic and Chemicals Ltd.* case and the other in *Indian Mica Micanite Industries Vs. The State of Bihar and Others*,

13. In the case of *Modi Distilleries (supra)* the Apex Court referring to the judgment of *Synthetic and Chemicals Ltd. (supra)* has held that no doubt that the framers of the Constitutions, when they used the expression "alcoholic liquors for human consumption", meant, and the expression still means, that liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as a beverage or drink. Alcoholic or intoxicating liquors had to be understood as they were, not what they were capable of or able to become. Entry 51 of List II was the counterpart of Entry 84 of List I. It authorised the State to impose duties of excise on alcoholic liquors for human consumption manufactured or produced in the State. It was clear that all duties of excise save and except the items specifically excepted in Entry 84 of List I were generally within the taxing power of the Central Legislature. The State Legislature had limited power to impose excise duties. That power was circumscribed under Entry 51 of List II. It had to be borne in mind that, by common standards, ethyl alcohol (which had 95 per cent strength) was an industrial alcohol and was not fit for human consumption. The ISI specifications had divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverages and industrial alcohols were clearly and differently treated. Rectified spirit for industrial purposes was defined as spirit purified by distillation having strength not less than 95 per cent by volume of ethyl alcohol. Dictionaries and technical books showed that rectified spirit (95 per cent) was an industrial alcohol and not potable as such. It appeared, therefore, that industrial alcohol, which was ethyl alcohol (95 per cent), by itself was not only non-potable but was highly toxic. The range of potable alcohol varied from country spirit to whisky and the ethyl alcohol content thereof varied between 19 to about 43 per cent, according to the ISI specifications. In other words, ethyl alcohol (95 per cent)

was not an alcoholic liquor for human consumption but could be used as a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor, etc. In the light of experience and development, it was necessary to state that "intoxicating liquor" meant only that liquor which was consumable by human beings as it was.

14. It has further held that in respect of group B cases which related to demands made for the excise duty on wastage during transportation in containers of high strength spirit of 80-85% from the distillery to warehouse and group D cases which relates to the excise duty sought to be levied on pipeline wastage during the process of manufacture before dilution, what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption. It has further held that Rule 775 of the U.P. Excise Rules, 1910 and various other Rules, which incorporated the mode of levy of excise duty upon the alcohol other than alcoholic liquor for human consumption however, wide it may be, cannot extend the power of the State Government to levy excise duty which is limited by the Constitution and the statute.

15. In the case of Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, (hereinafter referred to as "the Vam first case") the Apex Court has upheld the levy on denaturation fee on the ground that it was regulatory in nature and existence of quid pro quo is not necessary.

16. In the case of Bihar Distillery (supra) which is being heavily relied upon by the learned Advocate General, which is a decision by two learned Judges, the Apex Court has held that the decision in Synthetics and Chemicals Ltd. (supra) did not deal with the aspect which are arising for consideration herein and was mainly concerned with the industrial alcohol, i.e., denatured rectified spirit, It has held that--

"(3) So far as the industries engaged in the manufacture of rectified spirit, both for the purposes of (a) supplying it to industries (other than industries engaged in obtaining or manufacturing potable liquors/intoxicating liquors) and (b) for obtaining or manufacturing or supplying it to Governments/persons for obtaining or manufacturing potable liquors are concerned, the following is the position: The power to permit the establishment and regulation of the functioning of the distillery is concerned, it shall be the exclusive domain of the Union. But so far as the levy of excise duties is concerned, the duties on rectified spirit removed/cleared for supply to industries (other than industries engaged in obtaining or manufacturing potable liquors), shall be levied by the Union while the duties of excise or rectified spirit cleared/removed for the purposes of obtaining or manufacturing potable liquors shall be levied by the State Government concerned. The disposal, i.e., clearance and removal of rectified spirit in the case of such an industry shall be under the joint control of the Union and the State

concerned to ensure evasion of excise duties on rectified spirit removed/cleared from the distillery. It is obvious that in respect of these industries too, the power of the states to take necessary steps to ensure against the misuse or diversion of rectified spirit meant for industrial purposes (supply to industries other than those engaged in obtaining or manufacturing potable liquors) to potable purposes, both during and after the manufacture of rectified spirit, continues unaffected. Any rectified spirit supplied, diverted or utilised for potable liquors shall be supplied to and/or utilised, as the case may be, in accordance with the State excise enactment concerned and the rules and regulations made thereunder. If the State is so advised, it is equally competent to prohibit the use, diversion or supply of rectified spirit for potable purposed."

17. In the case of State of Bihar and Ors. v. New Swadeshi Sugar Mills Ltd. and Anr. (2003) 11 SCC 478, which is a judgment delivered by three Hon"ble Judges, the Apex Court has held that no duty can be levied by the appellant State on the rectified spirit having regard to the provisions of the Constitution as held by this Court in the case of Synthetic and Chemicals Ltd. (supra) wherein the provisions in various State Acts which purport to levy a tax or charge upon industrial alcohol, also called rectified spirit, and alcohol used and usable for industrial purposes, are unconstitutional.

18. In the case of State of Bihar and Others Vs. Industrial Corporation Pvt. Ltd. and Others, the Apex Court while considering the question as to whether the State Government was competent to impose penal duty on the respondents in respect of some loss occurring in the quantity of molasses for manufacture of rectified spirit on the presumption that the quantity of the molasses lost had been diverted to manufacture country liquor or liquor fit for human consumption and whether it could be justified as compensation for a breach of a condition of contract, has considered its decision in the case of Bihar Distillery (supra) and it has observed as follows:

"24. How far and to what extent the said observations are correct need not be considered by us but suffice it out point out that this decision had not noticed the earlier decision given by a Bench of three learned Judges in Modi Distillery. Modi Distillery applies on all fours to the facts of the present case and we are bound thereby. Even otherwise, it appears that the question as to whether any excise duty can be levied by the State upon the industrial alcohol or rectified spirit useable for industrial purposes is concluded by a decision of this Court in State of Bihar v. New Swadeshi Sugar Mills Ltd. which arose out of a judgment of the Patna High Court in New Swadeshi Sugar Mills Ltd. v. State of Bihar wherein it was held: (Pat LJR pp. 108-09, paras 8-9)

"8. The contention of the learned counsel for the State, apart from what is stated in the notice (Annexure 2), was that the petitioner Company is liable to pay duty on the spirit because rectified spirit by subsequent dilution becomes potable and thus fit for human consumption and, therefore, duty could be recovered from the petitioner Company, which is thus liable to compensate the loss caused to the

Government due to non-delivery by application of Rule 33 of the Rules made by the Board of Revenue under the notification dated 29.4.1919 (hereinafter referred to as "the Rules").

9. It is, therefore, essential to examine whether rectified spirit can be subjected to levy of duty under the Act. Excisable article has been defined in Section 2(6) of the Act and clause (a) thereof is relevant for the present purpose, which is as follows-

"excisable article means-

(a) any alcoholic liquor for human consumption.

... ..

Liquor is defined in Section 2(14) of the Act which "includes all liquids consisting of or containing alcohol, such as spirits of wine, spirits, wine, fermented tari, pachwai and beer, and also unfermented tari, and also any other substance which the State Government may, by notification, declare to be liquor for the purposes of this Act." Intoxication has been defined in Section 2(12-a) of the Act, which means "any liquor or intoxicating drug". Section 2(19) defines "spirit" as "any liquor containing alcohol obtained by distillation, whether it is denatured or not". Thus, the total effect of the definition of "intoxicant", "liquor" and "spirit", read with the definition of excisable article, means that only a spirit meant for human consumption can be subjected to excise duty."

25. For the aforesaid reason, it must be held that no penal duty could have been imposed on rectified spirit.

26. So far as third submission of Mr. Ray to the effect that the penalty was in the nature of compensation for the breach of Condition 8 of the tender notice is concerned, the same has no merit. The tender notice does not provide for imposition of any penalty and in the absence of any opportunity to the distillers the penalty could not be realized nor could it be adjusted against the statutory price for rectified spirit."

19. In the case of State of U.P. and Others Vs. Vam Organic Chemicals Ltd. and Others, (hereinafter referred to as "the Vam second case") the Apex Court has held that the State cannot legislate on industrial alcohol despite the fact that such industrial alcohol has the potential to be used to manufacture alcoholic liquor. The Apex Court has referred to its earlier decision in the case of Bihar Distillery (supra) and has held that the decision in Bihar Distillery (supra) was doubted in Deccan Sugar and Abkari Co. Ltd. Vs. Commissioner of Excise, A.P., and it was said that the decision in Bihar Distillery (supra) ran counter to the scheme of legislative competence as examined by the Constitution Bench of this Court as well as in three Judges' decision of this Court in Modi Distilleries (supra) and the appeals were accordingly referred to a larger Bench for reconsideration of the judgment in Bihar Distillery (supra). The larger Bench followed Synthetics and Chemicals Ltd. and Modi Distilleries (supra) without expressly overruling the

decision in Bihar Distillery (supra). The Apex Court, therefore, in the Vam second case proceeded on the basis that the decision in Synthetics and Chemicals Ltd. (supra) continues to exclude the State from levying tax on industrial alcohol whether or not it has the potential to be used as alcoholic liquor.

20. In the case of Deccan Sugar and Abkari Co. Ltd. (supra) which is a decision by three learned Judges of the Apex Court, it has been held that the State legislature has no jurisdiction to levy any excise duty on loss of rectified spirit as no duty can be levied by the State on the rectified spirit. While holding so it has followed its decision in the case of Synthetics and Chemicals Ltd. and Modi Distilleries (supra).

21. Thus, it is well settled that the State has no power to levy the excise duty by whatever named called on rectified spirit as it is not a potable liquor and that such rectified spirit has the potential to be used to manufacture alcoholic liquor will not clothe the State with any legislative competence to levy excise duty. If there is bar to levy duty, the question of demanding duty on wastage also does not arise as held by the Apex Court in the case of Deccan Sugar and Abkari Co. Ltd. (supra).

22. It may be mentioned here that the duty is sought to be realised on transit loss of rectified spirit under Rule 633 of the Excise Manual which provides for demand of an amount equal to excise duty on the quantity of spirit exported for being realised. Thus, what is sought to be realised is the amount of excise duty on transit loss of rectified spirit. The nature of the amount for the loss remains the excise duty which State of U.P. has no legislative competence to realise. Further, the demand can also not be justified as compensation/penalty as held by the Apex Court in the case of Industrial Corporation (P) Ltd. (supra).

23. In the case of Devans Modern Breweries Ltd. (supra) Hon"ble S.B. Sinha, J. which is a minority judgment, has mentioned that the decision in Bihar Distillery (supra) was not expressly overruled. In fact, in paragraph 154 of the report, he has referred to the Vam second case wherein it has been mentioned that the decision in Bihar Distillery has not been expressly overruled.

24. In the case of Shree Baidyanath Ayurved Bhawan (P) Ltd. (supra) the Apex Court has applied the test laid down in the case of Bihar Distillery (supra) and has held that when Ayurvedic preparation is diverted to human consumption, the State has power to regulate and control such use.

25. It is no doubt true that the decision of the Apex Court in the case of Bihar Distillery (supra) given by two learned Judges have not been expressly overruled by the Apex Court in the case of Deccan Sugar and Abkari Co. Ltd. which is a decision by three learned Judges, yet the decision in the case of Modi Distilleries and Deccan Sugar and Abkari Co. Ltd. (supra), which are Bench decision of three learned Judges, specifically dealt with the point in issue.

26. It may be mentioned here that the principle of English law that size of the

Bench did not matter, has not been accepted in this country as held by the Apex Court in the case of A.R. Antulay Vs. R.S. Nayak and Another, It is also well settled that where there is a divergent opinion expressed by the Apex Court in Bench decisions comprising of two learned Judges and three learned Judges, the opinion on the law laid down by the Bench decision of three Judges is to be followed in preference to the Bench decision of the two learned Judges.

27. We are of the opinion that the law laid down in the aforesaid two cases more specifically in Deccan Sugar and Abkari Co. Ltd. (supra) wherein it has been held that no duty on wastage of rectified spirit can be levied by the State Government, is a law declared by the Apex Court and is binding upon us under Article 141 of the Constitution.

28. Thus, we find ourselves unable to accept the plea of the learned Additional Advocate General that the State is competent to levy duty on loss in transit on rectified spirit.

29. In view of the foregoing discussion, the writ petition succeeds and is allowed with costs, which we assess at Rs. 10,000/-. The demand notices 20.5.1995 and 30.5.1995 (Annexures 21 and 22 respectively to the writ petition) are hereby quashed.