(2008) 12 OHC CK 0040

In the Orissa High Court

Utkal Distilleries Ltd. (In all) APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:
Bihar and Orissa Excise Act, 1915 — Section 27(1)

Citation : (2009) 1 OLR 616

Hon'ble Judges : Sanju Panda, J;I.M. Quddusi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

I.M. Quddusi, J.—The relief claimed in these three writ petitions filed by the self-same petitioner being identical, they were heard together and are disposed of by this common judgment. In these three writ petitions, the petitioner prays for quashing of the demand notice calling upon it to pay duty on the weak spirit from the years 1994-95 to 2004-05.

2. The brief facts of the case are that the Commissioner of Excise, Orissa, vide Order dated 12.9.1990 (Annexure-1) granted licence in favour of the company M/s. Sitansu Mohan Pattnaik & Co. (Liquor) Pvt. Ltd. for manufacturing, bottling, blending and reduction of Indian Made Foreign Liquor (in short, "I.M.F.L.") from rectified spirit with the condition that the company shall install one rectification column to rectify/purify the rectified spirit to be used in manufacturing of better quality of I.M.F.L. The said company was subsequently renamed as M/s. Utkal Distilleries Private Ltd., the petitioner in these writ petitions.

3. As per the stipulation made in Annexure-1, the petitioner Company installed Extra Natural Alcohol Column (in short the "E.N.A."). It is to be noted that the ENA Column installed by the petitioner was the first of its kind in the State and since in this E.N.A. Column some amount of rectified spirit is lost at the time of trial and there was no rules allowing process loss in E.N.A. Column for rectification of Rectified Spirit (in short "R.S."), the petitioner Company

submitted a representation to the opposite party No. 2 vide letter dated 19.8.1992. Accordingly a committee was formed by the opposite party No. 2, which inspected the industrial unit of the petitioner Company on 27.8.1992 and submitted a report on the same day. Basing upon the report of that Committee, the opposite party No. 1 constituted a technical committee wherein the opposite party No. 2 was the Chairman. The specific instruction to the Committee was:

to examine the details of E.N.A. column including the stock of spirit inside the column and loss during trial run alongwith limit of wastage during the E.N.A. process etc.

4. It is not necessary to mention all the facts here. It is pertinent to mention that the petitioner had filed a writ petition bearing O.J.C. No. 8635 of 1994 for a direction to the opposite party No. 1 to take a decision on the report of the technical committee constituted vide order dated 21.12.1992 which submitted its report on 17.6.1993. The said writ petition was disposed of on 10.1.1995 with a direction to opposite party No. 1 to take a decision on the report of the technical committee and communicate the same to the parties concerned within three months from that date. Thereafter the opposite party No. 1 vide letter dated 11.1.1995 intimated the petitioner that the Government have decided to allow 2% process loss while re-distilling the rectified spirit in the E.N.A. column basing on the report of the technical committee. However, demand notice was issued to the petitioner to pay excise duty on the weak spirit on the ground that after deducting the allowable wastage, excise duty is chargeable on the balance stock of rectified spirit put to redistillation in the E.N.A. column.

5. According to the petitioner, it represented to the Government in response to demand notice stating that to purify the rectified spirit in E.N.A. column certain chemicals like fusel oil etc. along with water are used. In the process of purification some rectified spirit being volatile evaporates causing loss of rectified spirit. The Government had allowed 2% process loss of the re-distillation of the rectified spirit in the E.N.A. But while rectifying the rectified spirit in E.N.A. column some residue are left which include mainly fusel oil, water and very few percentage of R.S. and other chemicals which is known as impure spirit/weak spirit which are not fit for human consumption. Therefore, the Government has no authority to impose excise duty on the weak spirit. Thereafter, another demand notice dated 8.7.1998 was issued to the petitioner against which petitioner filed O.J.C. No. 9369 of 1998 in which notice was issued and stay was granted. The said weak spirit was also sent for chemical analysis to the Drugs Controller of Orissa with the consent of opp. party No. 1 to know whether the weak spirit are fit for human consumption or can be converted into IMFL. By reports dated 12.8.1999 and 22.3.2000 as contained in Annexure-8 series, it was reported by the Chemical Examiner to the Government of Orissa and Deputy Drugs Controller that the subject sample of weak spirit has been tested for limit tests and Ethyl Alcohol conten.t-54.8? OP and found not to have passed limit test for Acidity, Aldehydes, Fusel Oil and Furfural as per I.S.323-1959 for rectified

spirit and hence considered to be unfit and unsafe for potable purpose and in all the reports it has been categorically mentioned that the sample spirit to be unfit and unsafe for potable purpose and, therefore, unfit for human consumption.

Sub-section 1 of Section 27 of the Bihar & Orissa Excise Act, 1915 (hereinafter referred to as "the Act, 1915") deals with the power to impose duty on import, transport and manufacture. According to the Explanation duty may be imposed on any article under this Subsection at different rates according to the places to which such article is to be removed for consumption, or according to the varying strengths and quality of such article. The said provision is quoted as under:

27(1) (An Excise duty or countervailing duty, as the case may be) at such rate or rates as the (State Government) may direct, may be imposed either generally or for any specified local area on:

(a) any excisable article imported; or

(b) any excisable article exported; or

(c) any excisable article transported; or

(d) any excisable article (other than tari) manufactured under any licence granted in respect of Clause (a) of Section 13; or

(e) any hemp plant cultivated, or any portion of such plant collected under any licence granted in respect of Clause (b) or Clause (c) of Section 13; or

(f) any excisable article manufactured in any distillery or brewery licensed, established, authorized or continued under this Act.

6. Learned Additional Government Advocate has submitted that the report of the Technical Committee is not under challenge in these writ petitions. Sub-section (19) of Section 2 of the Act 1915 defines the "spirit" according to which "spirit" means any liquor containing alcohol obtained by distillation, whether it is denatured or not, and therefore, whether the spirit may be a country spirit or not and whether the same is fit for human consumption or not are immaterial and, therefore, excise duty is leviable on the same.

7. The plea taken by the opposite parties in their counter affidavit is that the spirit declared unfit for human consumption by the Chemical Examiner can be made fit for human consumption only by the process of re-rectification which the petitioner Intentionally has not done and the ENA column was allowed to make the spirit fit for human consumption from the spirit unfit for human consumption by the process of re-rectification. But since it is an admitted case that the spirit which was declared unfit for human consumption was never made fit for human consumption by any process, the fact remains that the excise duty has been imposed on the spirit which is not fit for human consumption.

8. The duties of excise can be leviable only under the limits of the Constitution. Entry 51 of List-2 of Schedule 7 of the Constitution relates to duties of excise.

The said entry is quoted as under:

Duties of the excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates as similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

Since the excise duty is leviable on alcoholic liquor only for human consumption, therefore that part of the liquor which is not fit for human consumption or waste cannot come within the scope of Entry 51 of List II.

9. A Constitution Bench of the apex Court in the case of Synthetics & Chemicals Ltd Etc. v. State of U.P. and Ors. AIR 1990 1927 has held that the State Legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre. The relevant paragraphs of the Hon''ble apex Court''s judgment are quoted herein below:

67. The Balsara''s case (AIR 1951 SC 318) (supra) was in the context of the business of potable alcohol. Problems arose with regard to auctions, vends, licences and the business of manufacturing, selling, etc of potable alcohol. Until the case of State of Uttar Pradesh and Others Vs. Synthetics and Chemicals Ltd. and Others, which is under challenge here, all other cases since then have dealt with potable alcohol. The only case which has dealt with alcohol used for industrial purposes was the case of Indian Mica Micanite Industries Vs. The State of Bihar and Others, . The Constitution of India it has to be borne in mind, like most other Constitutions is an organic document. It should be interpreted n the light of the experience. It has to be flexible and dynamic so that it adapts itself to the changing conditions and accommodates itself in a pragmatic way to the goals of national development and the industrialization of the country. This Court should, therefore, endeavour to interpret the entries and the powers in the Constitution in such a way that it helps to the attainment of indisputed national goals, as permitted by the Constitution. As mentioned hereinbefore, the relevant entries in the Seventh Schedule to the Constitution demarcate legislative fields and are closely linked and supplement one another. In this connection, reference may be made to entry 84 of list I which deals with the duties of excise of tobacco and other goods manufactured or produced in India except, inter alia, alcoholic liquors for human consumption. Similarly, entry 51, list II is the counterpart of entry 84 of list I so far as the State List is concerned. It authorizes the State to impose duties of excise on alcoholic liquors for human consumption and opium, etc. manufactured or produced in the State and the countervailing duties at the same or lower rates on similar goods produced or manufactured elsewhere in India. It is clear that all duties of excise save and except the items specifically excepted in entry 84 of list I act generally within the taxing power of the Central

Legislature. The State Legislature has power, though limited it is, in imposing duties of excise. That power is circumscribed under entry 51 of list II of the seventh Schedule to the Constitution. As we have noted hereinbefore, the correct principles of harmonious interpretation of legislative entries have been laid down in several cases. We have mentioned hereinbefore some of the decisions as noted in the decision of this Court in India Cement (supra), In M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, , this Court has laid down that:

(i) legislative entries are to be liberally construed. But when a topic is governed by two entries, then they have to be reconciled. It cannot be that one entry is to be liberally construed and the other entry is not to be liberally construed.

(ii) under the Constitutional scheme of division of powers under legislative lists, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.

(iii) a Constitution is an organic document and has to be set treated and construed.

(iv) if there is a conflict between the entries, the first principle is to reconcile them. But the Union power will prevail by virtue of Article 246(1) & (3). The words "notwithstanding" and "subject to" are important and give primacy to the central legislative power.

73. It has to borne in the mind that by common standards ethyl alcohol (which has 95) is an industrial alcohol and is not fit for human consumption. The petitioners and the appellants were manufacturing ethyl alcohol (95%) (also known as rectified spirit) which is an industrial alcohol. ISI specification has divided ethyl alcohol (as known as the trade) into several kinds of alcohol. Severage and industrial alcohols are clearly and differently treated. Rectified spirit for industrial purposes is defined as "spirit purified by distillation having a strength not less than 95% of volume by ethyl alcohol". Dictionaries and technical books would show that rectified spirit (95%) is an industrial alcohol and is not potable as such. It appears, therefore, that industrial alcohol which is ethyl alcohol (95%) by itself is not only non-potable but is highly toxic. The range of spirits of potable alcohol is from country spirit to Whisky and the Ethyl Alcohol content varies between 19 to about 43 per cent. These standards are according to the ISI specifications. In other words, ethyl alcohol (95) is not alcoholic liquor for human consumption but can be used as raw material in-put after processing and substantial dilution in the production of whisky, gin, country liquor, etc. In many decisions, it was held that rectified spirit is not alcohol fit for human consumption. Reference may be made in this connection to Delhi Cloth and General Mills Co. Ltd. v. Excise Commissioner, U.P. Allahabad Special Appeal No. 177 of 1970 decided on 29th March, 1973. In this connection, it is important to bear in mind the actual provision of entry 8 of list II. Entry 8 of list II cannot support a tax. The above entry contains the words "intoxicating liquor". The

meaning of expression "intoxicating liquor" has been rightly interpreted by the Bombay High Court in Balasara''s case AIR 1951 SC 318 (supra). The decision of 1951 Bom 210, at p.214. In that light, perhaps, the observations of Fazal Ali, J in Balasara''s case (supra) requires consideration. It appears that in the light of the new experience and development, it is necessary that "intoxicating liquor" must mean liquor which is consumable by human being as it is and as such when the word "liquor" was used by Fazal Ali, J., they did not have the awareness of full use of alcohol as industrial alcohol. It is true that alcohol was used for industrial purposes then also, but the full potentiality of that user was not then comprehended or understood. With the passage of time, meanings do not change but new experiences give new colour to the meaning. In Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , a Bench of five Judges have surveyed the previous authorities. That case dealt with the auction of the right to sell potable liquor. The position laid down in that case was that the State had the exclusive privilege or right of manufacturing and selling liquor and it had the power to hold public auctions for granting the right or privilege to sell liquor and that traditionally intoxicating liquors were the subject matters of state monopoly and that there was no fundamental right in a citizen to carry on trade or business in liquor. All the authorities from Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, to Har Shankar''s case (supra) dealt with the problems or disputes arising in connection with the sale, auction, licensing or use of potable liquor.

95. A comparison of the language of these two entries clearly demonstrates that the powers of taxation on alcoholic liquors have based on the way in which they are used as admittedly alcoholic liquor is a very wide term and may include variety of types of alcoholic liquors but our Constitutions makers distributed them into two heads:

(a) for human consumption

(b) other than for human consumption

Alcoholic liquors which are for human consumption were put in Entry 51 list. It authorizes the State Legislature to levy tax on them whereas alcoholic liquors other than for human consumption have been left to the Central Legislature under Entry 84 for levy of duty of excise. This scheme of these two entries in Lists I and II" is clear enough to indicate the line of demarcation for purposes of taxation of alcoholic liquors. What has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation.

96. Entry 8 in List 2 reads:

8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors."

This Entry talks of intoxicating liquors and further on refers to production, manufacture, possession, transport, purchase and sale of these liquors. It appears that the State has levied some kind of duties in various names at each of these stages used in this Entry i.e. production manufacture, possession, transport, purchase and sale. But from the scheme of entries in the three lists it is clear that taxing entries have been specifically enacted conferring powers of taxation whereas other entries pertaining to the authority of the Legislature to enact laws for purpose of regulation. Entry 8 in List II if we compare with entry 51 it is clear that when Entry 51 authorizes the State Legislature to levy tax and duties on alcoholic liquors fallings in 51, Entry 8 confers authority on the State Legislature to enact laws for regulation. Similarly are Entries in List 1. As regards regulation or regulatory fees it was contended that Entry 52 in list 1 empowers the Parliament to declare the industries which the Union proposes to control in public interest under Industries Regulation Act. Entry 52 list I reads as under:

152. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

98. Under the circumstances therefore it is clear that the State Legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre.

10. In view of the above, we are of the opinion that the State can impose excise duty only within the ambit of the Constitution and when Constitution does not permit the State to impose duty on the alcoholic liquor not fit for human consumption, the State has no authority to impose duty on such alcoholic liquor.

Therefore, the impure spirit/weak spirit which according to the chemical analysis is not fit for human consumption cannot be subjected to duty and, therefore, the demand notices demanding the excise duty in respect of the same are illegal and hence are liable to be quashed.

11. In the result, the writ petitions are allowed and the impugned demand notices are quashed. There would be no order as to costs.

Sanju Panda, J.

I agree.

