

Union of India and Others

Vs

Barmalt (India) Ltd. Gurgaon and Others

Civil Appeals No. 960 of 1986

(B. P. Jeevan Reddy, S. B. Majmudar JJ)

18.02.1997

JUDGMENT

B. P. JEEVAN REDDY J.

1. In this appeal preferred against the judgment of the Delhi High Court, two questions arise, viz., whether the malt and malt extract produced by the respondent, Barmalt (India) Private Limited (Barmalt), falls within the expression "food product" in Exemption Notification No. 55 of 1975 dated 1-3-1975 and whether the respondent is entitled to refund of the excess duty paid by him pending the decision of the High Court. The Assistant Collector took the view that malt and malt extract cannot be treated as food products and, therefore, are not entitled to the benefit of the said notification. On a writ petition being filed, the Delhi High Court upheld the respondent's plea and also held that it is entitled to the benefit of the said exemption notification. On the second issue, the Delhi High Court has overruled the Revenue's plea based on the theory of unjust enrichment. When this appeal came up for hearing on an earlier date, we held that the High Court was right in saying that malt and malt extract do qualify as food products and, therefore, the respondent has been rightly held entitled to the benefit of the aforesaid notification. But then the question arose about the respondent's right to refund. On this aspect, we posted the matter for further hearing because of the peculiar situation arising in this matter, to which we shall now advert.

2. Consequent upon the decision of the High Court, Shri Harish Salve, learned counsel for the respondent, says, the respondent, Barmalt, became entitled to refund of Rs. 2,67,00,983.16p which was the amount of duty paid by it. Pursuant to the impugned judgment of the High Court, it is stated, an amount of Rs. 2,41,53,497.92p has been refunded to it. The balance amount of Rs. 25,47,485.24p is still refundable to it. On these facts, in the ordinary course, we would have disposed of the matter in terms of Mafatlal Industries Ltd. v. Union of India [(1997) 5 SCC 536 : (1996) 9 Scale 457] and the format order, which we have devised pursuant to the said judgment but Shri Harish Salve brought to our notice certain facts on the basis of which he asks for certain specific directions. The facts stated by him are the following.

3. The respondent, Barmalt, is one of the three major producers of malt and malt extract in the country. The other two being Malt Company of India Limited and A. K. Malt (Private) Limited. The malt and malt extract produced by these units is purchased by certain specified industries only. The industries purchasing malt and malt extract fall under two categories, (i) industries engaged in the manufacture of beverages, like Bournvita and Horlicks etc. and (ii) the breweries and distilleries engaged in manufacturing Indian Made Foreign Liquors. One of the category (i) industries is H.M.M. Limited, now known as Smith Kline Beecham Consumer Health Care Limited, respondent in the connected appeal. Like other purchasers in category (i), H.M.M. Limited took pro forma

credit of the duty paid by it on the purchase of malt/malt extract in terms of Notification No. 201 of 1979, which was in force at the relevant time. Other purchasers in category (i) also did the same. [So far as category (ii) purchasers, i.e., distilleries and breweries are concerned, Shri Salve says that they were not entitled to and did not avail of any pro forma credit for the duty paid by them when they purchased malt/malt extract from the respondent or the other two units, as the case may be.] But when the Delhi High Court held, under the judgment impugned herein, that no duty was payable on the clearance/removal of malt and malt extract by virtue of Exemption Notification No. 55 of 1975, the Revenue was obliged to refund the duty collected back to Barmalt. Having done that, the Revenue served notices upon the purchasers of malt and malt extract [H.M.M. Limited and others] calling upon them to reverse the pro forma credit taken by them and pay or adjust the duty payable accordingly. This put the purchasers like H.M.M. Limited in peril. They had already paid the duty (to Barmalt and other two producers) while purchasing the malt/malt extract and now they were being asked to pay the same duty over against to the State on the ground that the State has refunded the duty to Barmalt (and the other two producers) pursuant to the judgment of the High Court. When this demand was raised against H.M.M. Limited, it disputed the same on several grounds including limitation and the Tribunal appears to have accepted its claim only on the ground of limitation. (As already stated, there are other purchasers, like H.M.M. Limited, falling in the first category mentioned above.)

4. Shri Salve suggests that this problem can be solved in the following manner : Barmalt will pay over the entire duty to H.M.M. Limited and other similar purchasers (who have availed of the pro forma credit). There are only three purchasers in the first category. As a matter of fact, out of the sum of Rs. 2,41,53,497.92p, Barmalt has already refunded an amount of Rs. 1,28,87,580.34p to H.M.M. Limited and other similar purchasers. (The payment to H.M.M. Limited is stated to be in the sum of Rupees eight lakhs.) Barmalt will pay over the rest of the amount (received by them by way of refund) to the respective purchasers. Even the amount of Rs. 25,47,485.24p will also be paid over to the respective purchasers as soon as it is received from the Revenue. In this manner, Barmalt would have paid over the entire amount received by them by way of refund to their purchasers in which case no question of unjust enrichment would arise in the case of Barmalt. So far as purchasers are concerned, they would also not stand to lose in any manner. They would get the money from Barmalt and would then pay over/adjust the amount to the Revenue. If these two steps are completed, neither the Revenue stands to lose nor would the purchasers stand to lose and Barmalt would also not be unjustly enriched. The solution suggested by Shri Salve sounded attractive when suggested and accordingly notices were directed to the other two producers of malt and malt extract, viz., Malt Company of India Limited and A. K. Malt (Private) Limited - and then we discovered several difficulties in the way of accepting the suggestion of Shri Salve. They are : (a) While the Revenue has filed the appeal against the decision of the Delhi High Court in favour of Barmalt (against the order impugned herein), no appeals have been preferred by the Revenue against similar orders in favour of other two producers aforesaid. Those two producers have taken the refund and the orders in their favour are said to have become final. Their counsel stated that they are not willing to abide by or implement the said suggestion - or formula, if we can call it one - and that there is no reason why they should pay over the amounts which they have received by way of refund when the orders of refund in their favour have become final. (b) The purchasers like H.M.M. Limited have not purchased exclusively from Barmalt. They have purchased from all the three producers. The other purchasers are not before us. Only the H.M.M. Limited is before us. It is the respondent in the connected appeals, viz., Civil Appeals Nos. 3387-88 of 1992. An undertaking has been filed on behalf of H.M.M. Limited stating that they are agreeable to the said formula provided the formula is applied uniformly to other two producers viz., Malt company of India Limited and A.

K. Malt (Private) Limited also. Shri Lakshmi Kumaran, learned counsel for the H.M.M. Limited, no doubt stated that if this formula is applied and implemented uniformly, H.M.M. Limited would be prepared to reverse the pro forma credit equal to the amount received by them from the said three producers notwithstanding the fact that H.M.M. Limited has already succeeded before the Tribunal on the ground of limitation. The counsel stated that though according to law, H.M.M. Limited is not obliged to reverse the credit by virtue of the decision of the Tribunal in their favour, they are yet prepared to reverse the credit if the formula suggested by Shri Salve is applied uniformly in case of all the purchasers of malt and malt extract. Besides the purchasers in category (i), there are a large number of purchasers in category (ii), who are also not before us.

5. Faced with these difficulties, it was suggested by Shri Lakshmi Kumaran and by Shri Salve that if the other two producers, [Malt Company of India Limited and A. K. Malt (Private) Limited] refuse to abide by the said formula, this Court should, in the interest of justice, invoke its powers under Article 142 of the Constitution and direct them to abide by and implement the said formula. We have considered the said suggestion but we think that it would not be feasible or possible to work out the said formula in the facts and circumstances brought to our notice. Neither the other two producers are before us nor are all the purchasers before us. It would be an endless and a highly complicated exercise which we do not think advisable to undertake. In the circumstances, we have no alternative but to dispose of the appeals as they stand. So far as Civil Appeal No. 960 of 1986 (Barmalt) is concerned, we direct - in view of the admitted fact that it has passed on the burden of duty to its purchasers - that Barmalt should refund to the State the amount received by them by way of refund (pursuant to the impugned judgment of the Delhi High Court) except a sum of Rupees eight Lakhs. In view of the fact that H.M.M. Limited is now before us and it has admittedly received the said sum of Rupees eight lakhs from Barmalt, the H.M.M. Limited is directed to reverse the credit taken by it to the extent of Rs. 8,00,000 (Rupees eight lakhs only) and pay it over to the State.

6. Civil Appeal No. 960 of 1986 is allowed in the above terms. No order as to cost.

CAs Nos. 2447 of 1989, 3387-88 of 1992 and 9947 of 1995

7. No separate arguments were addressed in these appeals in view of the debate regarding the formula suggested in Civil Appeal No. 960 of 1986. List these appeals accordingly for disposal on merits next week.