

SUPREME COURT OF INDIA

State of Bihar

Vs.

Industrial Corporation Pvt. Ltd.

(V Khare and S Sinha JJ.)

04.09.2003

ORDER

1. Whether the State of Bihar can levy penalty for loss or wastage of molasses, and if so, under which law and to what extent and further whether such loss can be directed to be recovered from the respondents, are the questions involved in this batch of appeals which arise out of the judgment and order dated 15.05.1996 passed by a Division Bench of the Patna High Court allowing the writ petitions filed by the respondents herein.
2. Molasses is a bye-product of sugar and is mainly used as a raw material for manufacture of spirit, including alcohol for human consumption.
3. The sale of molasses in the State of Bihar is regulated by an Act, known as 'the Bihar Molasses (Control) Act, 1947 (the 1947 Act).
4. The respondents herein are the companies registered under the Indian Companies Act and are engaged in the business of manufacture of spirit in the State of Bihar for which they hold licence under the Bihar Excise Act, 1915 (the 1915 Act).
5. The respondents had been granted different licences under the provisions of the Bihar and Orissa Excise Act, the details whereof are as under :

Sl. No. Name of the distilleries Licence granted in Excise Form Nos. Writ applications filed by them

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1. M/s. Bihar distillery Ltd. 25, 28-A CWJC No. 6845/89, 11972/93
 2. M/s. Arun Chemical Industries 25,27,28 1517 and 1518 of 1984
 3. M/s. Cawnpore Sugar Works Ltd 25,27,28 2334/84, 5648 and 5649 of 1986
 4. M/s. S.K.G. Consolidated Ltd. 25,27,28, 28-A 2385/88
 5. M/s. New Swadeshi Distillery Ltd. 25, 28-A 6433/88, 4696/9.4 & 8032/95
 6. M/s. Ram Narain & sons 28, 28-A 5484 & 5487/90

6. It is not in dispute that the respondents herein admittedly were engaged in the manufacture of rectified spirit from molasses which are allotted by the Controller of Molasses in terms of the provisions of the 1947 Act and the rules framed thereunder. Some of them are also holders of licences granted in terms of Section 13 of the 1915 Act. While carrying on such manufacture of spirit, allegedly some loss had occurred in the quantity of molasses supplied by the Controller of Molasses. The Comptroller and Auditor General in its report allegedly found out a potential loss of revenue by reason of such loss or wastage of molasses. In the said report the purported potential loss of revenue in relation to each of the licensee had been quantified. Pursuant to or in furtherance of the said audit report notices were issued to the respondents herein levying penal duty. The nature of such penal duty, the extent of shortfall and the period where for notices had been issued would appear from the following chart which may be noticed herein by way of example as disclosed in C.A. No. 4619-20 of 1997.

"Civil Appeal No. 4619-20 of 1997

State of Bihar v. Arun Chemical Industries Pvt. Ltd.

CHART OF SHORTFALL AND PENAL DUTY

1 2 3 4 5 6

PERIOD MOLASSES ALLOTTED RECTIFIED SPIRIT RECTIFIED SPIRIT SHORT FALL PENAL DUTY

(in quintals) desired as per Tender Notice condition No. 8 of recovery of 36 London proof litres (Lpl) per ql. Of molasses (in Lpl.) actually produced by the distillery from the molasses allotted to the Respondent under the Bihar Molasses Control Act, 1947 (in Lpl) In recovery of Rectified spirit as alleged by the Excise Commissioner (in Lpl) Demanded under Excise Commissioner's impugned order dt. 13.2.84 on the short fall relying on Tender Notice @ Rs. 17.30 and Rs. 207-per Lpl. Respectively. Later sought to be recovered under letter dt. 13.3.84 by set-off against price payable to the Respondent under Form 27 for the supply of Rectified Spirit (in Rupees)

1.12.81 to 31.3.82 11706.5 421434.0 377939.1 43494.9 7,52,461.77 1.4. 82 to 30.11.82 21203.7
763333.2 72885.2 37778.0 7,55,560.00 -----

15,18,021.77

7. The appellants herein sought to justify levy of the said penal duty relying on or on the basis of condition No. 8 of the Tender Notice dated 25.8.1980 purported to have been issued under Section 22 of the Bihar Excise Act for wholesale supply of country spirit to the retail vendors for the period from 1.11.1980 to 30.9.1983. It is not in dispute that the owners of the distilleries who had been granted licences in Excise Form Nos. 28 and 28A questioned the terms and conditions of licenses as also the terms and conditions of molasses allotment order, whereby and whereunder they were required to produce/manufacture 22.5 bulk liters or 36.0 L.P. liters of spirit from one quintal of molasses.

8. The appellant in imposing the penalty, presumably was of the view that the respondents herein had diverted the molasses towards manufacturing either country liquor or liquor, which is fit for human consumption.

9. It is at this stage the respondents herein filed petitions under Article 226 of the Constitution before the Patna High Court, inter alia, on the ground that the penalty is illegally sought to be imposed in respect whereof neither the State Legislature is competent nor the State Government is entitled to recover the same. In any event neither any notice of any kind was issued on the quantum of penalty sought to be imposed and recovered.

10. A counter affidavit was filed on behalf of the appellants herein wherein the levy was sought to be justified on the ground that the State legislature is competent to levy duty on the out-come of the molasses and in any event the spirit was meant for human consumption. The matter was heard before a Division Bench of the Patna High Court. The appellants herein conceded that the penal duty is not in the nature of a duty under the Excise Act. However, imposition of penalty was sought to be justified on the ground that since condition No. 8 of tender notice, provided that in the event any shortfall occurs in recovery of spirit from the molasses allotted, the licensee would be liable therefore.

11. The High Court noticed that the purported Clause 8 of the aforementioned tender notice was incorporated only in the licences contained in Form No. 27. It further noticed that all the respondents were not holders of licenses in the said form. The High Court considered the jurisdiction of the appellants herein for impost of such levy from the viewpoint of the State's legislative competence in the light of the decision of this Court in Synthetics and Chemical Ltd. v. State of U.P. . Upon a detailed consideration of the contentions raised by the parties, the High Court allowed the writ applications upon setting aside the levy impugned in the writ applications holding :

(i) before creating a demand of penal duty or penalty, no show cause notice was issued to the respondents and the same was levied merely on the basis of the audit report;

(ii) that the State had no jurisdiction to levy any duty;

(iii) no finding has been arrived at by the authorities before issuing the impugned demand notice as regard shortfall in production of rectified spirit that the molasses had been diverted or misutilised

for illicit distillation or there had been contravention of the 1947 Act and the rules framed thereunder;

(iv) the 1947 Act and 1915 Act do not provide for levy of any such penalty;

(v) all the respondents did not take part in the tender process nor were they eligible therefore having regard to the nature of licences possessed by them;

(vi) even in relation to those who were holders of the licences for carrying out the distillation work such a clause in the tender notice without any specifications as to how and under what circumstances penalty could be levied was arbitrary;

(vii) no machinery for recovery of the same having been created nor any authority has been specified under the 1915 Act for adjudication of levy or recovery of such penalty, reference to condition No. 8 of the tender notice providing for levy of penalty was meaningless;

(viii) nothing has been brought on record to show that either in the 1915 Act or 1947 Act or the rules framed thereunder penalty could be levied, or there is any factual foundation that by less production of ethyl alcohol from molasses, the same had been diverted or misused as a substitute for potable alcohol and the State has suffered the purported loss of excise duty on potable alcohol and thus, the claim is farfetched;

(ix) the provisions of 1915 Act could be invoked only against a person to whom a licence had been granted in terms of Section 13 thereof and who is bound to manufacture country liquor from the molasses so supplied; and

(x) even if it be assumed that there has been less production of spirit from the molasses, the remedy as provided for breach of the provisions of the Molasses Act or the Rules framed thereunder could only be resorted to having regard to the facts and circumstances of the case, and not by way of raising the impugned demands.

12. It is against the said judgment of the High Court the appellants are in appeal by way of special leave petitions before us.

13. Shri Tapas Ray, learned senior counsel appearing for the appellants, inter alia, urged that in the facts and circumstances of the case, no opportunity was required to be given to the respondents before imposing the penalty and that the State legislature is competent to levy duty on the products of the molasses, which partakes to the character of compensation. In any case the penalty imposed was in the nature of compensation for the breach of Condition No. 8 of the tender notice.

14. Coming to the first ground, it is not disputed that no opportunity of bearing of any kind was afforded to the respondents herein before the penalty was sought to be imposed and recovered. It is also admitted that there was no adjudication of the alleged breach of condition No. 8 of the tender notice. In *A. Mohammed Basheer v. State of Kerala and Ors.* - , it was held that unless there is a determination of breach of contract and damages are quantified, no damages can be imposed and recovered. In *General Manager, North East Frontier Railway and Ors. v. Dinabandhu Chakraborty* , this Court held that the Government cannot be a judge in its own cause in absence of any statutory provision empowering it to act as such. In *Vishnu Rice Mill, Bilaspur v. Regional Food Controller*,

Bareilly and Ors. - 1984 All L.J. 592 it was held by Allahabad High Court as under:

"Learned Standing Counsel, however, contended that the State Government was justified in withholding both the price payable to the petitioner and the release certificate claimed by the petitioner if it could be shown that the claimed by the petitioner if it could be shown that the petitioner had failed to perform its obligation under the agreement between the parties, Learned Standing Counsel placed reliance upon Clause 9 of the said Order which has been quoted above. In our opinion, this contention of the learned Standing Counsel is not tenable. Clause 9 itself shows that even though the State Government has a statutory authority to direct a rice miller, still, the terms and conditions on which the Government paddy will be converted into rice by the licensed rice miller will be 'such terms and conditions as may be agreed upon'. The agreement itself containing the terms and conditions cannot be said to be a statutory contract merely because the State Government has a right under Clause 9 to direct a rice mill to convert paddy into rice. It has been stated above that along with the counter-affidavit annexure C.A. 1 has been annexed, which is said to be the agreement between the parties. In Clause 11 of the said agreement there is a provision for arbitration in case of dispute, difference, or question touching or arising out of the agreement or the subject-matter thereof. In our view, if the State Government has any grievance that the licensed miller has failed to fulfill the terms and conditions of the said agreement between the parties, it is not open to the State Government to seek its redress in respect of such grievance by withholding the release certificate under Clause 3(4) or by withholding or by making any deduction from the price which is payable by the State Government to the petitioner under Clause 7 of the said Order."

15. We may further notice that in *Dwarka Prasad Agarwal (D) By LRs. and Anr. v. B.D. Agarwal and Ors.* this Court laid emphasis on the right of a citizen to have his grievances adjudicated by an impartial tribunal holding:

"There is another aspect of the matter which must also be taken notice of. A party cannot be made to suffer adversely either indirectly or directly by reason of an order passed by any court of law which is not binding on him. The very basis upon which a judicial process can be resorted to is reasonableness and fairness in a trial. Under our Constitution as also the International Treaties and Conventions, the right to get a fair trial is a basic fundamental /human right. Any procedure which comes in the way of a party in getting a fair trial would be violative of Article 14 of the Constitution of India. Right to a fair trial by an independent and impartial Tribunal is part of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950."

16. In the present case, what we find is that before creating a demand of penal duty or penalty, there was no adjudication by any authority as regard to the breach committed by the respondents. We also find that no opportunity of any kind was offered to the respondents before the demand as regard the penal duty was pressed against the respondents. The matter was not even examined as to what was the reason for shortfall in the production of rectified spirit. The Molasses Act does not provide for imposition of such penalty in the event of shortfall of spirit. It must, therefore, necessarily be held that the imposition of the impugned penalty being against the principles of natural justice is illegal and void.

17. The statutory authorities must act within the four-corners of a statute. They could take recourse to the proceeding for levy of penalty and the recovery thereof from the respondents only in the event there existed any agreement or statutory provision therefore. Such a power did not exist in the Commissioner of Excise or the Superintendents of Excise who had issued the impugned demand notices.

18. The statutory authorities also could not have sought to levy penalty relying on or on the basis of the audit report only. They were required to apply their own independent mind for the purpose of finding out as to whether the respondents in law had committed any breach of the terms and conditions of licence or the provisions of 1947 or 1915 Acts so as to make them liable for levy of penalty. The concerned authorities acting in terms of the statutory provisions, therefore, without any further investigation could not have acted mechanically on the audit report.

19. So far as the second submission of Mr. Ray is concerned, it would not detain us very long as the matter stands almost covered by a catena of decisions of this Court. In *Synthetics and Chemicals Ltd. and Ors. v. State of U.P. and Ors.* this Court, while interpreting Entry 84 of List I, Entries 8 and 51 of List II and Entry 33 of List III of Schedule VII held that the State legislature has no power to enact law levying duty on the spirit, which is not meant for human consumption. It was also held that the State has the power to impose duty only on the spirit, which is for human consumption under Entry 51 of List II of Schedule VII.

20. The appellants have admitted that the stage at which such penalty was sought to be levied was manufacture of rectified spirit. The respondents had not carried out any activities in relation to manufacture of potable liquor from the molasses.

21. This decision was followed in *State of U.P. and Ors. v. Modi Distillery and Ors.* stating:

"9. It is convenient now to note the judgment of a Bench of seven learned Judges of this Court in *Synthetics and Chemicals Ltd. v. State of U.P.* This Court stated that it had no doubt that the framers of the Constitution, 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 a 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."

22. Shri Ray, however, relied upon the decision in Bihar Distillery and Anr. v. Union of India and Ors., . In that case it was held that the State is empowered to impose duty if it is found that the rectified spirit is being removed from the distillery for the purpose of manufacture of potable liquor. In this case, we find that as a matter of fact, no foundation in that behalf in the counter affidavit of the appellants before the High Court has been laid down.

23. Even in Bihar Distillery (supra) the court categorically held that the State legislature had no legislative competence in relation to manufacture of industrial alcohol which is a subject-matter of Entry 52, List I of the Seventh Schedule of the Constitution of India, having regard to the fact that the Parliament had enacted the Industries (Regulation and Development) Act, 1951. It, however, sought to distinguish Synthetics and Chemicals (supra), inter alia, on the ground that where industries are engaged in the manufacture of rectified spirit for the purpose of obtaining or manufacturing potable liquors or supplying the same to the State Government or its nominees for the said purpose, they would be under the total and exclusive control of the States in all respects including the establishment of the distillery. However, a third category was also carved out in relation to those industries which are engaged in manufacture of rectified spirit both for the purpose of supplying it to industries and for obtaining and manufacturing potable liquor in relation whereto it was stated :

"...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 on 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 purposes, i.e., for obtaining or manufacturing 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 purposes."

24. How far and to what extent the said observations are correct need not be considered by us but suffice it to point out that this decision had not noticed the earlier decision given by a Bench of three learned Judge in Modi Distillery (supra). Modi Distilleries (supra) applies in 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 and Ors. v. New Swadeshi Sugar Mills Ltd. and Ors. (Civil Appeal No. 3343 of 1983) disposed of on 24.8.1994 which arose out of a judgment of the Patna High Court in The New Swadeshi Sugar Mills Ltd. and Anr. v. The State of Bihar and Ors. [(1983) PLJR 105] wherein it was held:

"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 dilatation 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 the 29th April, 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.

xx xx xx

Liquor is defined in section 2(14) of the Act which "includes all liquids consisting of or containing alcohol, such as spirit of wine, spirit, wine fermented tari pathway and bear, 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." Intoxicant has been defined in Section 2(12a) 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 the third submission of Mr. Ray to the effect that the penalty was in the nature of compensation for the breach of condition No. 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.

27. It is furthermore interesting to note that the Comptroller and Auditor General in its counter affidavit before the High Court as also before this Court stated that the steps for recovery of such amount was required to be taken for avoiding 'potential loss of revenue due to wastage of molasses in the distilleries'. The stand of the appellants, thus, runs contrary to the stand of the Comptroller and Auditor General, although the impugned demand was made pursuant to or in furtherance of its report.

28. It will bear repetition to state that the appellants herein by issuing the demand notices sought to give effect to the report of the Comptroller and Auditor General. It is, therefore, not correct to contend that they intended to recover the amount by way of compensation by alleging loss to it for which respondents became liable in terms of condition No. 8 of the tender notice (supra). Revenue being a subject-matter of legislation in terms of Entry 8 of List II of the Seventh Schedule of the Constitution of India, the recovery thereof must be made in terms of the provisions of a legislative

Act enacted pursuant thereto and not by reason of an executive fiat.

29. As is evident, the appellants have sought to exercise its statutory power and not a contractual obligation. Reliance placed in this behalf by Mr. Ray on *State of Orissa and Ors. v. Narain Prasad and Ors.* is not apposite in the fact situation obtaining herein. The respondents therein were the highest bidders in respect of the various liquor shops in Orissa. Their bids were accepted. They executed agreements in the prescribed form and were issued licences. Each of them had undertaken under the agreement/contract to lift a particular specified quantity of liquor every month. They carried on their business in terms of the licences but failed to lift the agreed minimum guaranteed quantity and further failed to remit the excise duty as provided under Rule 6-A. It was, in that situation, this Court observed :

"...A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round according to this decision, and question the validity of those obligations or the validity of the Rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour."

30. Therein the liability of the respondents were found to have arisen from the terms of contract qua contract. Such is not the position herein.

31. Mr. Ray, therefore, is not correct when he submits that such demand was made in terms of the condition of the contract in respect whereof the writ petitions of the respondents were not maintainable.

32. However, before we part with this case, we would like to clarify that the opinion of the High Court to the effect that in view of the decision of this Court in *Synthetics and Chemicals (supra)*, the State has no legislative competence even in relation to potable liquor (which is fit for human consumption) is not correct. The legal position in this behalf has succinctly been explained inter alia in *State of U.P. v. Synthetics and Chemicals Ltd.* , *State of U.P. and Anr. v. Synthetics & Chemicals Ltd. And Anr.* and *Siel Ltd. And Ors. v. Union of India and Ors.* .

33. For the aforesaid reasons and subject to the aforesaid modification of the impugned judgment, we dismiss these appeals. There shall be no order as to costs.