

SUPREME COURT OF INDIA

State of Uttar Pradesh and Others

Vs

Saraya Industries Limited

Civil Appeal No. 2670 of 2006 With Civil Appeal Nos. 2648, 2649, 2650, 2669, 2678, 2647 of 2006 and 2671 of 2005

(S. B. Sinha and P. P. Naolekar, JJ)

12.05.2006

JUDGMENT

S. B. SINHA, J.

Leave granted.

The respondents herein are owners of distilleries. Right to manufacture various categories of Indian Made Foreign Liquor within the meaning of the provisions of the Uttar Pradesh Excise Act, 1910, as amended in 1950, (for short, 'the Act) has been granted to them by the State of Uttar Pradesh. They have been granted licence for manufacturing potable liquor. They indisputably have been paying excise duty in terms of the provisions of the Act.

2. The State of Uttar Pradesh on or about 03.02.2001 allegedly adopted a policy decision for the excise year 2001 -02 which commenced from 01.04.2001 to the effect that the distilleries had to obtain and affix security holograms issued by the department to prevent evasion of duty and smuggling of liquor. The Excise Commissioner issued a circular on 21.02.2001 providing that every distillery would receive holograms from his office, where for plants had been established. Another circular letter was issued on 24.03.2001 directing that holograms on bottles, pouches and cans would be affixed by the distilleries. The excise duty was payable on the bottles, pouches and cans

etc. on which holograms had been affixed. Different kinds of holograms had been provided for different sizes of bottles/ pouches, for different quantities and qualities of liquor. Procedures to be followed for obtaining the said holograms, transporting etc. thereof by the distilleries were also provided. It was provided that the distilleries would be entitled to receive holograms from the incharge excise inspector on day- to-day basis and a register was required to be maintained as regards the stock of the holograms issued, the number of holograms wasted and the closing stock thereof. The excise duty was to be deposited before issuance of bottles, pouches and canes affixed with holograms. Furthermore, the excise duty was to be chargeable on the wasted holograms, which would be destroyed under the orders of the Excise Commissioner.

3. A new policy of execution of indemnity bonds in the prescribed form in Form PD-16-A was directed to be issued by circular letter dated 08.11.2001, whereby and whereunder, the distilleries were made themselves responsible for indemnifying the State for any loss of excise duty or such other payment awarded as compensation or damages by any court of law or tribunal or Commissioner. The said circular letter further provided that holograms which were returned to the excise department as damaged or wasted and verified by the Authorized Committee would not be exigible to any excise duty. However, if the wasted holograms were not produced for verification, the same shall be presumed to have been misused as a result whereof the distilleries would be liable to pay excise duty on the quantity of liquor which could have been charged, if the holograms had not been wasted and the distilleries were made liable to compensate the State for the loss of duty on the quantity of liquor which could have been issued under the missing security holograms.

4. On or about 19.11.2001, the Excise Commissioner issued a clarification that in case any loss is caused to the security holograms during transit, the distilleries would be liable to compensate the Governor for loss of alleged duty on the quantity of the liquor, which could have been issued under the lost security holograms.

5. An Authorized Committee came to be appointed by the Excise Commissioner, which visited the premises of the distillery of the respondents between 15.07.2001 to 20.07.2004. Before the said Committee all the wasted holograms were allegedly not produced. A statement was prepared by the said Committee showing the number of holograms found to have been wasted/ damaged but the serial number could not be read and categorized as missing holograms. The respondents were directed to deposit the excise duty on the quantities mentioned in the said holograms.

6. The writ petitions were filed by the respondents herein before the Allahabad High Court questioning the legality of the said circular dated 03.02.2001 as also the circulars dated 21.02.2001, 24.02.2001, 16.06.2001, 29.10.2001, 08.11.2001 and 19.11.2001 issued by the Excise Commissioner, inter alia, on the ground that no presumption could be raised that wasted security holograms which could be produced for verification before the I Authorized Committee would be deemed to have been misused. By reason of the [impugned judgment, the said writ petitions have been allowed.

7. The State is, thus, before us.

8. The High Court in passing the impugned judgment, inter alia, opined I (i) that the duty cannot be charged on the basis of loss of holograms, as excise duty! was payable in terms of the notification issued under Section 29 of the Act; and (ii) no notification having been issued excise duty demanded only on the basis of the circulars issued by the Excise Commissioner on account of holograms, is bad in law.

9. Mr. Rakesh Dwivedi, the learned Senior Counsel appearing on behalf of (tm) Appellant, submitted that by reason of the circular letters issued by the Excise Commissioner only effect was given to the rules framed by the State dated 19.03.2008

10. Our attention, in this connection, has been drawn to the indemnity bond as prescribed in Form No. PD-16-A in terms whereof the distillers had undertaken to pay such amount of damages in case of loss or misplacement of the holograms, which would be equal to the amount of excise duty involved in such missing holograms. Our attention, in this behalf, has also been drawn to a rule made on 23.01.2004, in terms whereof a similar provision had been inserted.

11. Mr. Dwivedi urged that the regulatory measures having been taken by the Excise Commissioner so as to prevent evasion of payment of excise duty, no notification was required to be issued nor any rule was required to be framed. The Act, whenever any such notification is required to be issued, Mr. Dwivedi would contend, provides for the same and, thus, notifications were not required to be issued.

12. Mr. Ashok H. Desai, the learned Senior Counsel appearing on behalf of the respondents, on the other hand, submitted that the object sought to be achieved being levy of additional excise duty, it was obligatory on the part of the State to issue an appropriate notification in terms of Section 29 of the Act. It was submitted that excise duty was payable on actual quantity of liquor manufactured and not on notional quantity thereof. Furthermore a duty cannot be levied by incorporating a condition in the licence. It was furthermore contended that the power of the Excise Commissioner to issue directions being limited, and imposition of duty is within the exclusive domain of the State, the same must be effected by way of a notification and not by way of a circular.

13. Before we advert to the rival contentions of the parties, as noticed hereinbefore, we may take note of certain provisions of the Act.

14. 'Excisable articles' has been defined in Section 3(22a) to mean : (a) any alcoholic liquor for human consumption; or (b) any intoxicating drug.

15. Section 18 provides for establishment or licensing of distilleries and warehouses. A licence therefor is to be issued on such condition as the State Government deems fit to impose as regards the construction and working of a distillery or brewery or manufacturer.

16. Section 19 provides for removal of intoxicants from distillery, etc. The power to levy duty on excisable articles is provided for under Section 28 of the Act. Section 29 of the Act lays down the manner in which the duty is to be levied, mandating that for the said purpose a notification should be issued in terms whereof directions as enumerated in the clauses mentioned therein should be made. Section 31 provides for the forms and conditions of licences on the terms mentioned therein. In terms of Section 41 of the Act, the Excise Commissioner may make rules.

17. Indisputably, the rules in terms of the said provisions providing for issuance of such holograms have been made for the first time in 2004. Pursuant to or in furtherance of such rule making power, however, rules have been framed. Indisputably, in terms of the said rules, manufacture, processing, distribution, and payment of excise duty, transport etc. are regulated. Rule 715 provides for accounts to be kept by distillers. Rule 716 provides that such accounts would be open to inspection at all times by the officer-in-charge and all superior officers. Rule 719 empowers the Excise Commissioner to appoint officer to the charge of distilleries, in the following terms:

"719. Excise Commissioner to appoint officer to the charge of distilleries. - The Excise Commissioner will appoint such officers of the Excise Department as he may see fit to the charge of distilleries. The pay of such officers, will be met by Government provided that when the annual establishment charges exceed the sum of total of 10 per cent of the duty leviable on the issues made from the distillery to districts in the State, plus 60 per cent, of the export duty levied on the export of liquor during the year, this excess shall be realized from the distillers."

18. Instructions for maintaining forms and registers are also provided in Rules 815 and 821, which read as under:

"575. General rules to be observed.-The prescribed registers and forms of accounts are not to be deviated from or added to without the special orders of the Excise Commissioner. All fractions of gallons and of degree of strength are to be shown to the nearest first point of decimals. To preserve uniformity, the system of increasing the first figures of decimals by one when the second is 5 or more should be adopted in proof conversions.

Overwriting and erasures are forbidden; any necessary corrections must be clearly made and must be initialed."

"821. Distillers declaration of wash Form P.D.8.- Distillers must thoroughly dissolve the saccharine materials used by them when they set up the wash; and declare in Form P.D. 8 the kind and quantity of material used, the actual saccharometric gravity corrected for temperature before fermentation commenced and the total quantity for wash made."

19. No controversy has been raised on behalf of the appellant that in the event it be held, as has been done by the High Court, that by reason of the said circular letters excise duty sought to be levied,

the same would be bad in law.

20. The submission of Mr. Dwivedi, however, as noticed hereinbefore, was that it was done with a view to obviate the difficulties faced by the distillers and for the purpose of preventing evasion of payment of excise duty by way of regulatory measure. The rule made by way of notification dated 19.03.2001 is not applicable to the distillers. It is on applicable to wholesale shops. The provisions of the said rules cannot be made applicable to the distillers, as the rules for the wholesale shops and distillers stand on different footings.

21. Mr. Dwivedj, in our opinion, is not correct in contending that the circular letters referred to hereinbefore, were issued only with a view to obviate the difficulties faced by the distillers for implementation of matters relating to issuance of holograms, as provided for in the rules. Mr. Dwivedi was also not correct in relying upon the indemnity bond purported to have been executed by the appellant in terms whereof the licensees agreed to keep the State indemnified for the loss of security of holograms, inasmuch as the indemnity bonds were executed after the period in question, 2004 Rules to which our attention has also been drawn are also indisputably not applicable.

22. Our attention has also been drawn to the licences granted in favour of the distillers which allegedly contained clauses relating to payment of duty, in case of damages or shortages of security holograms by the licensees in their personal capacity. The licence, to which our attention has been drawn by the appellant, was issued on or about 01.04.2004 i.e. after the coming into force of the 2004 Rules.

23. The State indisputably is entitled to take recourse to such measures as it may think necessary, with a view to prevent evasion of payment of excise duty or for the purpose of preventing adulteration etc. The State does not say that prevention of adulteration was the purpose for which the said circular letters were issued. We have noticed hereinbefore that during the period in question, there did not exist any rules. No notification was also issued by the State. The licence did not contain any clause relating to payment of excise duty either by way of penalty or damages for loss and/ or damage caused to the security holograms. In the circular letter dated 03.02.2001, it was, inter alia, provided : "7. The main revenue is of Excise duty. Therefore, the license fee should be so determined that on the basis of consumption a substantial increase in Revenue is achieved in the next year.

8. In order to check the evasion of excise duty and smuggling of excise, a serialized/holographic sticker is to be provided for use on the bottles of liquor and the convenience issue of liquor after payment of due excise duty is made."

24. The said circular letter, therefore, did not provide for any penal clause or a clause requiring the licensee to pay any damages. It merely provides for the manner in which the purported evasion of excise duty was sought to be prevented. By circular letter dated 21.02.2001, the distilleries were advised to arrange application machine in every distillery for affixing security holograms on bottles etc. It specified the price of such holograms. It, however, provides that without affixing the security

holograms and paying the excise duty liquor for human consumption will not be issued. A letter was issued by the Excise Commission where again emphasis has been laid on the purpose for which the security holograms were to be affixed on bottles etc. namely, to secure Government revenue or to impose restriction on the sale of illegal liquor. By reason of circular letter dated 24.03.2001, a detailed procedure has been laid down in regard to issuance of such holograms, relevant clauses whereof are as under:

"...These security holograms are to be affixed on bottles, pouches and canes at the level of Distilleries/ Breweries/Vintineres/foreign liquor bond (BWFL 2/2A/2B) which shall be conclusive proof of the fact that liquor contained in it is manufactured by a legally authorized unit as per standard norms. Accordingly a safe and secure transportation, storage possession and custody is essential so that unsocial elements and liquor smugglers may not illegally catch hold of such holograms and the Government Revenue as well as the safety of public health may be secured.

5. The supply of security holograms shall be made only to such authorized representative of Distillery/ Breweries/Vintinery/license holders of Foreign liquor bond whose signatures have been attested in the indent form by the officer incharge of the Distillery/Brewery/Vintinery/ license holder of foreign liquor bond and a photo identity card jointly signed by the officer incharge of the Distillery / Brewery / Vintinery / license holder of foreign liquor bond and the incharge of the indenting unit. Such an identity card had to be produced before the officer incharge (hologram) Excise Headquarter Allahabad at the time of issue of security holograms."

10. The Distillery / Brevery / Vintinery / license holders of foreign liquor bond shall as per their requirement obtain the security holograms from the officer incharge (Excise) of the concerned unit and their daily receipt shortage, use, wastage etc. shall be recorded in the prescribed register HG-6. The wasted security holograms during its use by the concerned unit shall be kept safe in an envelop and the code number mentioned on such hologram shall be recorded in the register and a fortnightly statement of wastage of such holograms shall be made available through officer incharge of the concerned unit to the officer incharge (holograms) headquarter at Allahabad.

11. The work of destroying the wasted holograms by burning them shall be done on a quarterly basis, after verification of wastage of such holograms by the officer incharge (Excise) of the concerned unit and after the approval of the Excise Commissioner and in the presence of Deputy Commissioner Excise of the charge, officer incharge (Excise) of the unit an officer nominated by the Excise Commissioner and the Manager of the concerned unit. A report to this effect shall be forwarded to the officer incharge (Holograms) to headquarters.

12. After the receipt of the holograms from the officer incharge (Excise) of the unit, the concerned unit shall be responsible for the safety, storage, use etc. of such holograms and its daily record shall be kept by the concerned unit in a register HG-6 and they shall be totally responsible to compensate any loss in revenue as a consequence of such wastage of holograms.

13...For any misuse of security holograms or for not affixing the proper hologram as per

classification of the liquor resulting in any loss to the revenue the concerned unit shall be totally responsible."

25. A presumption can be raised only by law. 'Conclusive proof is also within the realm of Evidence Act.

26. Although by way of regulatory measures directions may be issued in regard to the maintenance of register in such a manner in which the wasted holograms were to be maintained; but by reason of an executive fiat, a unit cannot be made responsible to compensate any loss to the revenue as a consequence of such wastage of such holograms. Furthermore making the concerned unit totally responsible for any misuse of security holograms or for not affixing the proper hologram as per classification of the liquor must result in loss to the revenue.

27. We may notice the difference between the rules and the conditions of licence which came to be imposed as regard issuance and use of security holograms and the provisions contained in the impugned circular letters. The circular dated 19.03.2001 categorically provided for payment in advance of excise.

28. We have noticed hereinbefore that the contention of Mr. Dwivedi, that the circular letters have been issued to the benefit of the respondent distilleries was wholly incorrect. The said rules were not applicable at all and the question of giving any relaxation from the rigours thereof did not and could not arise. The distillers were asked to execute bonds. Such bonds had been executed in November 2001, which is beyond the period in question. Only in terms of such indemnity bonds, the concept of payment of damages and that too in the form of liquidated damages, was evolved. The position came to be clarified only by the rules framed by the State on 23.01.2004 wherein it was stated:

"6(c) The licensee shall submit the Security Hologram/Holographic Shrink Sleeves in tact received from the approved supplier with Hologram Removal pass to officer in charge of the distillery. In case of shortage in Security Hologram/Holographic Shrink Sleeves the licensee shall be liable to deposit the excise duty involved in the missing Hologram/ Holographic Shrink Sleeves."

29. Thus, by reason of the circular letter, the concept of payment of damages measured in terms of the excise duty had not been conceptualized.

30. The legislative field in regard to levy of excise duty is covered by Entry 51, List II of the Seventh Schedule of the Constitution of India. It may be true that the resort to regulatory measures can be taken by the State, but the same must be done in the manner laid down under the Act. A provision which confers powers upon a statutory authority in terms whereof a penalty is to be imposed, damages are to be paid for non payment of excise duty, in our opinion, must be done through a valid subordinate legislation and not by way of issuance of a circular letter.

31. In *Bimal Chandra Banerjee v. State of Madhya Pradesh etc* , this Court clearly laid down :

"Neither Section 25 nor Section 26 nor Section 27 nor Section 62(1) or clauses (d) and (h) of Section 62(2) empower the rule-making authority viz. the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. The Legislature has levied excise duty only on those articles which come within the scope of Section 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of Section 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to exercise a power which it did not possess."

32. The said decision has been followed in *Excise Commissioner, U.P., Allahabad and others v. Ram Kumar and others*, wherein this Court stated the law in the following terms :

"The common question of law that arises for determination in all these appeals is whether the condition incorporated in the licences of the respondents that they would lift the fixed minimum quantity of liquor and sell the same at their allotted shops and in case of their default or failure to do so, they would be liable to pay compensation equal to the amount of the excise duty leviable on the unlifted quantity is valid and enforceable. This point is no longer *res integra*. In *Bimal Chandra Banerjee v. State of Madhya Pradesh* this Court held that: "No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition. In the present case, the Legislature has levied excise duty or countervailing duty on the excisable articles which have been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under Section 13, or manufactured in any distillery or brewery established or licensed under the Act; and the State Government has not been empowered to levy any duty on liquor which the contractors failed to lift. Therefore, the State Government was exercising a power which it did not possess and hence the rule imposing the condition in the licences and the demand notices are invalid."

33. In *State of U.P. and others v. Modi Distillery and others 2*, this Court opined

"Mr. Sehgal submitted, in the alternative, that if it was the ultimate beverage which alone was exigible, the process of determining the wastage and levying excise duty thereon was only regulatory and, therefore, permissible. We are here concerned with the demand of the State for excise duty. The power of the State to demand excise duty is limited in the manner aforementioned. The demand for excise duty is not a regulatory measure. The power of the State to levy excise duty cannot be expanded with reference to its power to regulate manufacture. We are not required to and do not express any opinion in regard to the power of the State to regulate the manufacture of alcoholic liquors for human consumption."

34. The ratio of the said decision has been reiterated in *State of U.P. and others v. Vam Organic Chemicals Ltd. and others* 2004 (1) SCC 225.]

35. In State of U.P. and others v. Delhi Cloth Mills and another , this Court held :

"It is emphasised by Mr. Agarwal that this provision is meant to discourage evasion of duty. If any part of the lower export duty charged liquor is not in fact exported it should be made to pay the higher excise duty as payable on home consumed liquor. It does not impose any new duty. We are inclined to agree. This rule does not authorise imposition of any new tax but only authorises charging up excise duty on the excess wastage of liquor in course of export which was charged at concessional rate. The old Rule 814 of the Rules was made by B.O. No. 423/V-234-B, dated September 6, 1910 and No. 20/8 V-E 980-B, dated May 28, 1918 providing for allowance for loss in transit. It said:

"814. An allowance will be made for the actual loss in transit, by leakage, evaporation or other unavoidable cause, of spirit transported or exported under bond. The allowance is subject to the following maximum limits." Limits were prescribed differently for wooden casks and metal vessels, keeping in mind the duration of transport."

It was further observed:

'Thus, we find that the minimum (sic maximum) limits of wastage in transit was prescribed even under the old . rule. This by implication enjoined that the excess wastage would be taxed as if not wasted

In Mohan Meakin Breweries Ltd. v. Excise & Taxation Commissioner, Chandigarh 6 the appellant company carried on the business of manufacture, storage and sale of liquors. Between June 1967 and April 1969, it transported various quantities of liquor from its distilleries in U.P. to its bonded warehouse at Chandigarh. On arrival, the consignments were examined by the officer-in-charge of the warehouse, and a shortage was found, exceeding the wastage allowance permissible under Rule 8 of the Punjab Bonded Warehouse Rules, 1957. The Excise and Taxation Commissioner, exercising the powers of the Financial Commissioner, issued a show cause notice and then ordered the appellant to pay duty on the wastage in excess. The show cause notice required the appellant to pay duty on excess wastage in course of import of liquor from U.P. and the rules governing the appellant's licence provided for a wastage allowance not exceeding 1 per cent of the actual loss in transit by leakage or breakage of vessels or bottles containing liquor, and if the wastage exceeded the prescribed limit the licensee should be liable to pay duty at the prescribed rate as if the wastage in excess of the prescribed limit had actually been removed from the warehouse, and it was also provided that the Financial Commissioner could in his discretion on good cause being shown remit the whole or a part of the duty leviable on such wastage, and these provisions were challenged. This Court held that the impugned rules did not impose any new duty or create any liability and that they were in essence and substance of a regulatory character meant to guard against perpetration of fraud or deception on the revenue. "They provide for and regulate the storage and subsequently the removal of liquor from the bonded warehouse, on payment or otherwise of the duty which is chargeable under the Fiscal Rules of 1937." We agree with Mr. Agarwal that the instant Rules 636 and 814 are also of regulatory character and they are precautionary against perpetration of fraud on the excise revenue of the exporting State. If out of the quantity of military rum in a consignment, a

part or portion is claimed to have been wastage in transit and to that extent did not result in export, the State would, in the absence of reasonable explanation, have reason to presume that the same have been disposed of otherwise than by export and impose on it the differential excise duty. A statute has to be construed in light of the mischief it was designed to remedy. There is no dispute that excise duty is a single point duty and may be levied at one of the points mentioned in Section 28.

36. In *Government of Haryana v. Haryana Brewery Ltd. and another*, whereupon Mr. Dwivedi relied upon, this Court emphasized the need of a forum where a reasonable explanation for loss of good could be raised. In this case, such a forum was not available.

37. In *State of Bihar and others v. Industrial Corporation (P) Ltd. and others*, this Court clearly held :

"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 regards the breach committed by the respondents. We also find that no opportunity of any kind was offered to the respondents before the demand as regards 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.

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 vest in the Commissioner of Excise or the Superintendents of Excise who had issued the impugned demand notices."

38. It is, therefore, manifest that the duty has to be levied only in terms of the provisions of the statute and not de' hors the same.

39. It is accepted by Mr. Dwivedi that legislation relating to excise duty is relatable to Entry 51, List II of the Seventh Schedule of the Constitution of India. If that be so, provision for imposition of such duty or evasion thereof must be provided in terms of the law. By reason of an executive order, a presumption cannot be raised. No penalty can be levied. The matter would have been different, if the same was provided for, as has been sought to be done now, by way of terms and conditions of licence or in terms of the rules. By reason of an executive instruction, the provisions of the law cannot be effaced. A legislative policy, furthermore, must be laid down by the State. The matter relating to an excise policy must be framed by the State. It cannot be done by the Excise Commissioner. A distinction must be borne in mind between the concept of excise duty on production and manufacture of liquor and parting with the exclusive privilege of the State. Imposition of a penalty would not come within the purview of either of the two. When a price is

fixed by the State for parting with its exclusive privilege, the same must again be provided in terms of the statute and the rules framed there under or by way of terms of licence.

40. Before parting with the case, however, we may observe that we have not gone into the question as regard the applicability of the rules vis-a-vis the new conditions imposed in the licence, in the instant case.

41. We are, therefore, of the opinion that in absence of the requisite statutory backing, the impugned levy by the State cannot be held to be justified in law. We, therefore, do not find any merit in these appeals. They are dismissed accordingly. No costs.

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