

(2007) 07 AHC CK 0240

Allahabad High Court

Case No: None

Rajesh Kumar Tiwari

APPELLANT

Vs

The State of Uttar
Pradesh, The Excise
Commissioner and
District Excise Officer

RESPONDENT

Date of Decision: July 6, 2007

Acts Referred:

- Constitution of India, 1950 - Article 14, 265

Citation: (2008) 1 AWC 233

Hon'ble Judges: Vikram Nath, J; R.K. Agrawal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

R.K. Agrawal, J.

Civil Misc. Writ Petition No. 584 of 1999 has been filed by Rajesh Kumar Tiwari whereas Civil Misc. Writ Petition No. 585 of 1999 has been filed by B.D. Tiwari wherein identical relief for quashing the order dated 21st March, 1999 passed by the Excise Commissioner, U.P. Allahabad has been sought. They further seek refund of Rs. 11,33,500/- paid by the petitioner in Writ Petition No. 584 of 1999 and Rs. 3,13,550/- on foreign liquor and Rs. 22,683/- on low strength rum paid by the petitioner of Writ Petition No. 585 of 1999 as difference of the excise duty on the left over stock of previous year 1998-99.

2. Briefly stated the facts giving rise to the present petitions are as follows.

3. Rajesh Kumar Tiwari has been granted a licence in Form FL-2 for the wholesale vend of foreign liquor for the Excise Year 1999-2000 whereas B.D. Tiwari along with other fifteen persons has been granted a licence jointly in Form FL-5A for the retail vend of foreign liquor, comprising of 73 shops and licence in Form CL-5B for the

retail vend of country liquor comprising of 97 shops in the district of Kanpur Nagar for the Excise Year 1999-2000. Under the terms and conditions of the licence issued to the petitioners they were required to obtain supplies of foreign and country liquor from the bonded warehouses and the distilleries in respect of the wholesale vend and from the wholesaler of the district in respect of the retail vend. They had obtained the supplies after paying excise duty leviable on foreign liquor/country liquor as the case may be. During the Excise Year 1998-99, the excise duty on Indian Made Foreign Liquor was being levied at the rate of Rs. 407/- per alcoholic litres, on beer having alcohol up to 5 per cent v/v was being levied at the rate of Rs. 2 per bottle containing 570 millilitres or more but not more than 750 millilitres and on beer having alcohol more than 5 per cent v/v and up to 8 per cent v/v, it was being levied at the rate of Rs. 3.25 per bottle containing 650 millilitres. The Excise Commissioner U.P. Allahabad vide order 20th March, 1999 had directed the District Magistrates of all the districts to verify the left over stock of the previous Excise Year 1998-99 in view of the new rates of excise duty fixed by the State Government with effect from 1st April, 1999. The revised rates were also mentioned in the said order. The excise duty had been revised in respect of foreign liquor from Rs. 40/- to Rs. 48/- beer of 5 per cent v/v from Rs. 2/- to Rs. 3/- per bottle and beer from 5 per cent v/v to 8 per cent v/v from Rs. 3.25 to Rs. 5/- per bottle. This excise duty was applicable for the Excise Year 1999-2000. By another order dated 21st March, 1999, the Excise Commissioner, U.P. Allahabad directed the District Magistrates of all the districts to charge the difference of excise duty on the left over stock of the previous year before granting permission to sell the left over stock. The District Excise Officer, Kanpur Nagar made an inventory of the left over stock and vide order dated 8th April, 1999 directed the petitioners to pay the differential amount in the duty as a result of the enhancement before selling the left over stock. The petitioners had no other option but to pay the amount of difference as demanded by the District Excise Officer, Kanpur Nagar. Thus, Rajesh Kumar Tiwari deposited a sum of Rs. 11,33,500/- on 8th April, 1999 whereas B.D. Tiwari deposited a sum of Rs. 3,13,550/- as difference of excise duty on left over stock of foreign liquor and Rs. 22,683/- as difference of excise duty on low strength rum. After depositing the amount of duty they have approached this Court by means of the present writ petitions seeking refund of the amount so deposited as also quashing of the order dated 21.3.1999 of the Excise Commissioner, U.P. Allahabad on the ground that the excise duty is a single point duty, leviable at the time of issuance of liquor from the distillery which in the instant case had already been paid by the petitioners being licencees for the year 1998-99 and, therefore, no duty could be levied subsequently on the left over stock of the said year. Moreover, the same can be levied only by the State Government after publication in the official gazette. Reliance has also been placed on a Division Bench decision of this Court in Civil Misc. Writ Petition No. 458 of 1982, Kundan Lal, Dinesh Kumar v. Excise Commissioner, U.P. and Anr. decided on 23rd January, 1991 which has been followed subsequently in Civil Misc. Writ Petition No. 843 of 1991 Ram Sagar Jaiswal and Ors. v. The State of U.P. and Ors. decided on 25th

of July, 1991.

4. In the counter affidavit filed by K.R. Sonkar, District Excise Officer, Kanpur Nagar on behalf of respondent Nos. 1 to 3 it has been stated that the demand of difference in excise duty is justified and the same is to be made in the new excise year. The plea of unjust enrichment has also been raised for denying the refund.

5. In the rejoinder affidavit the averments made in the counter affidavit has not been accepted and the stand taken in the writ petition has been reiterated.

6. We have heard Sri Mukesh Prasad, learned Counsel for the petitioners and Sri S.P. Kesarwani, learned Standing Counsel appearing for the respondents.

7. Learned Counsel for the petitioners submitted that the excise duty which is levied by the State Government is a duty on manufacture of country liquor, foreign liquor, beer, rum etc. which is payable at the time of issuance of goods. The petitioners having paid the excise duty while taking supplies of the aforesaid goods during the Excise Year 1998-99, they are not liable to pay the enhanced excise duty in respect of the same stocks which were left over and were sold by them during the Excise Year 1999-2000 and the condition imposed by the authorities for permitting them to sell the left over stocks by demanding the difference in excise duty is not supported by any legal provisions. The demand is, therefore, violative of Article 14 and 265 of the Constitution of India. In support of his plea he has placed reliance upon a Division Bench decision of this Court in Civil Misc. Writ Petition No. 458 of 1982, Kundan Lal Dinesh Kumar v. The Excise Commissioner, U.P. Allahabad and Anr. decided on 23rd January, 1991 which has subsequently been followed by another Division Bench in Civil Misc. Writ Petition No. 27009 of 1991, Bhan Singh v. The State of U.P. and Ors. decided on 13th September, 1991 as also the decision of the Apex Court in the case of [T.J. Baby and Others Vs. State of Kerala and Others](#),

8. In reply Sri S.P. Kesarwani, learned Standing Counsel, submitted that under Rule 343 of the U.P. Excise Rules, a provision has been made for disposal of stock on termination of licences. The licences of the petitioners for the Excise Year 1998-99 came to an end on expiry of the same i.e. on 31st March, 1999 and the licence issued to them for the Excise Year 1999-2000 would be a fresh licence. The left over stock of the previous Excise Year 1998-99 has to be dealt with in the manner provided under Rule 343 of the U.P. Excise Rules, which enjoins all the licencees to surrender the left over stocks to the Collector and empowers the Collector to dispose of the same in the manner he deems fit. Even though the difference of the excise duty was deposited on the left over stock yet it is a consideration for granting permission to sell the left over stocks. He further submitted that the decisions relied upon the learned Counsel for the petitioners are distinguishable and the decision of the Apex Court in the case of T.J. Baby (supra) is not at all applicable. Relying upon the decision of the Apex Court in the case of [Mafatlal Industries Ltd. and Others Vs. Union of India \(UOI\) and Others](#), he submitted that even if the contentions of the

petitioners are accepted, they are not entitled for any refund as they must have passed on the enhanced duty which they had paid on left over stock to their customers and if refund is given it would amount to unjust enrichment.

9. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties. It is not in dispute that the licences issued to the petitioners for wholesale/retail vend of foreign liquor and country liquor are governed by the provisions of U.P. Excise Act, 1910 and the rules framed thereunder. The petitioners were issued the excise licences for the year 1998-99. They had some unsold stocks at the end of the period for which the licence had been issued i.e. on 31.03.1999. They had been granted excise licences for the next year i.e. 1999-2000. The concerned authority had granted them permission to sell the left over stocks of the previous year on payment of the difference of the excise duty as the duty had been enhanced for the year 1999-2000. The payment has been made as duty and not as licence fee as a consideration for permitting the licencees to sell foreign liquor, country liquor, beer, rum, etc. Rule 343 of the U.P. Excise Rules reads as under:

343. Disposal of stock on termination of licences.-- The holder of a licence for the vend of an intoxicant shall, on the termination of licence, report to the Collector the amount of stock, if any remaining in his possession. The Collector shall fix a time within which the vendor must dispose of such stock to a licensed vendor. Any stock not so disposed of shall, at the expiration of the period thus fixed be surrendered to the Collector who shall dispose of the same in the manner he deems fit. Excise Inspectors, will be held responsible for securing the observance of this rule. They must also ascertain in each case how the surplus stock has been disposed of.

10. From a perusal of the aforesaid Rule, we find that after expiration of the period of licence, the left over stocks has to be surrendered to the Collector and he is empowered to dispose of the same in the manner he deems fit. In the present case the left over stocks have been permitted to be sold by the same existing licencees, who also held the excise licences during the next year. The demand has been made as excise duty. This Court in the case of Kundan Lal Dinesh Kumar (supra) after considering the provisions of Rule 343 of the U.P. Excise Rules has held that increased price is leviable and is collected at the time of issuance of the stocks to the retailers and not at the stage of sale of stocks by the retailers to consumers and that would be true even in respect of the duty also. The aforesaid decision even though related to additional profit margin which would be equally applicable to a case of enhanced excise duty as held by this Court in another Division Bench decision in the case of Bhan Singh (supra). The Apex Court in the case of T.J. Baby (supra) has held that the enhanced differential duty cannot be realised in a subsequent year as liquor which had already suffered excise duty previously as it applies only to issue of liquor from the distillery, brewery, winery or other manufactory or warehouse. The submission of Sri Kesarwani is not correct that the authorities can impose condition

for granting permission to sell left over stock by asking the licencees to pay the differential amount of duty. In this view of the matter we are of the considered opinion that the order dated 21st March, 1999 issued by the Excise Commissioner, U.P., Allahabad directing the authorities to release the differential amount of duty as condition for granting permission to sell the left over stocks does not have backing of any statutory provisions.

11. The question still remains as to whether the petitioners having deposited the differential amount of enhanced excise duty while obtaining permission to sell the left over stocks are entitled for refund or not. The left over stocks must have been sold by the Petitioners before they had approached this Court. The presumption is that the burden must have been passed on to the consumers.

12. In paragraphs 19 and 21 of the counter affidavit filed by K.R. Sonker, a plea of passing of the burden to the customer has been raised. For ready reference paragraphs 19 and 21 of the counter affidavit are reproduced below:

19. That the contents of para 19 of the writ petition are legally misconceived hence denied, there is no question of force upon the petitioner as whatever amount has been paid by the petitioner on account of difference in duty, which was enhanced, the petitioner in his turn while selling the liquor to the customers would have realised and thus, ultimately the burden passed upon the customers and therefore, the averment that the petitioner shall suffer irreparable loss and injury is factually incorrect.

21. That in reply to the contents of para 21 of the writ petition, it is stated that in view of the facts and circumstances, stated above, the writ petition is devoid of merit. Moreover, if the relief No. 2 prayed by the petitioner is allowed then the same will result in unjust enrichment to the petitioner as the petitioner will realise the enhanced duty, which he has paid from the customers, who purchase liquor bottles and pay the price. In such a view of the matter, the deponent is advised to state that the petitioner is not entitled for relief No. 2 in the aforesaid facts and circumstances.

13. In paragraphs 10 and 12 of the rejoinder affidavit filed by Haneef Mohammad, pairakar of the petitioner, the averments made in paragraphs 19 and 21 of the aforementioned counter affidavit have been denied. Paragraphs 10 and 12 of the rejoinder affidavit are quoted below:

10. That the contents of paragraph 19 of the counter affidavit are not admitted and in reply is submitted that in view of the pronouncement of this Hon"ble Court the levy of difference of licence fee on left over stock of previous is absolutely illegal, arbitrary and without any authority of law. Moreover the petitioner has been saddled with the payment of duty twice, although the liquor has been sold only once -and it is not possible to pass on the burden to the cconsumer.

12. That the contents of paragraph 21 of the counter affidavit are misconceived and hence denied. It is submitted that the price of liquor is not fixed by the licencees on the basis of excise duty, but the same is fixed taking into account the licence fee and overhead expenses, hence there is no occasion for unjust enrichment by the petitioner. The money of the petitioner was blocked for the entire year because he could not dispose of his stock and now the petitioner had been made to pay additional duty illegally on that left over stock. Moreover all these facts have been considered by the earlier division benches of this Hon'ble Court, hence the impugned order dated 21.3.99 should be quashed and the additional duty paid by the petitioner be refunded to the petitioner with interest.

14. From the reading of the aforesaid averments, we find that it has not been specifically stated that the burden of enhanced excise duty has not been passed on to the customers. Only this much has been stated that it is not possible to pass on the burden to the consumer. Moreover, in paragraph 12 of the rejoinder affidavit there is an implied admission that the price of liquor has been fixed taking into account the licence fee and overhead expenses. The cost of liquor does form part of sale price. The plea of blocking capital in respect of unsold stocks of the earlier year has also been taken to justify the plea of refund. It does not establish that the amount of enhanced excise duty had not been passed on to the consumers.

15. The Apex Court in the case of Mafat Lal Industries Ltd. (Supra) has held that to prove that the duty has not been passed on to the consumers lies upon the persons who have been claiming refund and if this is not established, the question of refund does not arise as it would amount to unjust enrichment. The same view has been taken by the Apex Court in the case of [Commnr. of Central Excise, Calcutta Vs. Panihati Rubber Ltd.,](#)

16. In the case of State of U.P. and Ors. v. Vara Organic Chemicals Ltd. and Ors. (2006) 10 SCC 324 the Apex Court has held as follows:

5. Unjust enrichment is the retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected. It is a benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.

17. In the present case we find that the petitioners have not placed any material before the Court to show that the amount of the difference in duty had not been passed on to the consumers. The principles laid down by the Apex Court in the Mafat Lal Industries Ltd. (supra) is squarely applicable. Therefore, in those circumstances if a refund is granted, it would amount to unjust enrichment.

18. In view of the foregoing discussions, we are of the considered opinion that as the petitioners' licences for the Excise Year 1999-2000 had already come to an end long ago and it is not the case of the petitioners that the amount of enhanced excise duty has not been passed on to the consumers at the time of sale, the petitioners

are not entitled for refund. No relief can be granted to the petitioners.

19. The writ petitions are, therefore, fail and are dismissed.