(2011) 02 AP CK 0007

Andhra Pradesh High Court

Case No: WA No. 2002 of 2003

Government of Andhra Pradesh and another		APPELLANT
	Vs	
Kapitan Distilleries, Hyderabad and Others		RESPONDENT

Date of Decision: Feb. 25, 2011

Acts Referred:

- Andhra Pradesh (Indian Liquor and Foreign Liquor) Rules, 1970 - Rule 5(1)
- Andhra Pradesh Distillery Rules, 1970 - Rule 9
- Andhra Pradesh Excise Act, 1968 - Section 10, 11, 12, 12(3), 2(19)
- Andhra Pradesh Rectified Spirit Rules, 1971 - Rule 2
- Constitution of India, 1950 - Article 14, 301, 302, 303, 304

Citation: (2012) 1 ALD 107

Hon'ble Judges: N. Ravi Shankar, J; A. Gopal Reddy, J

Bench: Division Bench

Advocate: S. Ravi, for the Respondent

Final Decision: Allowed

Judgement

A. Gopal Reddy, J.

Whether according permission to levy import pass fee of Rs. 1/- per bulk litre on the import of Rectified Spirit (RS)/Extra Neutral Alcohol (ENA)/IS/Denatured Spirit (DS) by the State Government in G.O. Ms. No. 630, Revenue (Excise-III) Department dated 24.5.2003 is valid and sustainable in the light of Part XIII of the Constitution of India or not, is the short question sought to be replenished in the appeal by the State Government preferred against the order of the learned Single Judge dated 27.8.2003 passed in WP No. 12607/2003. The essential facts of the case and the

contentions of the writ petitioners which are necessary for disposal of this appeal may be stated in brief:

2. The writ petitioners-distilleries are granted licence in Form-D2 under the provisions of Rule 9 of Andhra Pradesh Distillery Rules, 1970 (for short "the Distillery Rules") for manufacture of Indian Liquor (IL). They filed the above writ petition contending that ENA is one of the raw materials used for the purposes of bottling potable liquor which is manufactured by blending ENA with appropriate flavouring agent and demineralised water. Indian Made Liquor (IML) so manufactured is bottled in different sized bottles. The label for each of the brand names, under which a manufacturer desires to bottle the liquor should be approved by the excise authorities on payment of fee of Rs. 2 lakhs. In addition to the above fee, the excise duty is imposed on the IML, which is bottled at different rates depending upon the category of the liquor which is manufactured and sold, which will be payable at the time of dispatch of IML from the distillery. The petitioners procure their requirement of ENA from various distilleries, located within the State of Andhra Pradesh and outside the State of Andhra Pradesh.

3. Having regard to the several factors, such as availability and quality, they purchase ENA from certain distilleries in the neighbouring States, because as against the total estimated annual requirement of ENA by all the IML producing distilleries in Andhra Pradesh of 1537.80 lakhs B.Ls., the net availability of ENA for IML manufacture in Andhra Pradesh is estimated at 750.76 lakhs B.Ls. For the purpose of transporting ENA from the distillery to the factories of the petitioners, a transport permit is required to be obtained from the Commissioner of Prohibition and Excise. While granting permit, the Commissioner of Prohibition and Excise imposes several conditions, namely, prescribed route and the period within which transportation is to be made. The consignment is accompanied by an escort provided by the Assistant Commissioner of Prohibition and Excise concerned. The cost of escort is to be borne by the licensee. There is no regulatory difference between ENA produced within the State and outside. ENA is available in plentiful in the neighbouring States of Maharashtra, Madhya Pradesh, Uttar Pradesh and Karnataka. The quality of ENA that is available especially from the State of Maharasthra is superior than the ENA available locally. ENA is the preferred ingredient in manufacture of IML. On submitting representation by the Association of Distilleries in the State of Andhra Pradesh for imposition of import fee on ENA purchased from distilleries outside the State with a view to discourage such imports and to encourage sales from the distilleries within the States, the State Government issued the impugned GO requiring the petitioners to pay the import pass fee at Rs. 1/- per bulk litre on the ENA imported from other States. The import fee can be levied on the items specified as per Rule 5(1)(a)(ii) of A.P. Indian Liquor and Foreign Liquor Rules, 1970 framed under A.P. Excise Act, 1968. As the rule is silent as far as importing of the items specified in the impugned GO, imposition of import pass fee is contrary to the rules and are invalid, and it violates the provisions of Art. 301 read

with Article 304 of the Constitution of India. Further as ENA is by itself is not an intoxicant no fee or levy can be imposed for its import.

4. A counter-affidavit has been filed by the respondents stating that the petitioners are D-2 licence holders manufacturing IML liquor. Their stand is after lifting of the prohibition, the State evolved its policy for production of IML based on ENA. ENA is manufactured by subjecting the rectified spirit to the second distillation to remove various impurities that are present in the rectified spirit. There are only two grades/ categories of IML with the proof strength of 25 degree UP and 35 degree UP in the State and the same will be marketed with different trade names. The petitioners obtained transport permit for import of ENA as required u/s 9 of the Act. As rectified spirit producing distilleries have decreased the production for want of market within the State, the IML manufacturing distilleries are importing RS/ENA from outside the State as the same is cheaper than the RS/ENA produced in the State. For export of rectified spirit, the exporter has to pay export pass fee of Rs. 1/- per bulk litre as per G.O. Ms. No. 445 Revenue (EX. III) Department dated 13.5.1996. To protect the interest of the local RS producing distilleries and to regulate the import of RS/ ENA, it is felt necessary to impose the import pass fee of Rs. 1/- per bulk litre for the import of RS/ENA. For export of locally manufactured ENA, the State is imposing the export pass fee of Rs. 1/- per bulk litre, similarly for import of ENA, the State is imposing import pass fee of Rs. 1/- per bulk litre and hence there is no discrimination.

5. The contentions of the learned Counsel for the petitioners found favour with the learned Single Judge and he held that the levy of import pass fee is required to be made only through an Act passed by the Legislature of the State under Article 304 of the Constitution of India. He also held imposition of export duty cannot be equated with an import pass fee and both are different and opposite incidences of tax. Since the Supreme Court set aside the countervailing duty on intoxicants on foreign liquor imported from outside the State of Orissa in Kalyani v. State of Orissa, AIR 1966 SC 1686, learned Single Judge was of the view that the impugned GO cannot be sustained and accordingly set-aside the same.

6. Learned Government Pleader for Excise contended that Section 9 of the A.P. Excise Act, 1968 (for short "the Act") prohibits import of an intoxicant except under a permit issued by the Commissioner subject to restrictions and conditions ensuring collection of excise duty and countervailing duty. In view of definition of "intoxicant" in Section 2(19) of the Act, including "liquor" in Section 2(21) and definition of "rectified spirit" including ENA in Section 2(k) of A.P. Rectified Spirit Rules, 1971, it is within the legislative competence to levy import pass fee. As the petitioners cannot claim any right over liquor business, part XIII of the Constitution cannot be applied. In support of the said submission, he relied upon the judgment of the Supreme Court in State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another,

7. Sri S. Ravi, learned Senior Counsel appearing for the respondents-writ petitioners while supporting the order impugned under appeal contended that levy of import fee is prompted by the State Government at the instance of A.P. Distilleries Association, which fact has been accepted by the respondents. Countervailing duty is an equal measure and judgment in Kalyani Stores''s case (supra), applies to the facts of the present case and therefore, the State Government is not competent to levy import pass fee. Alternatively, he contended that levy of import pass fee is violative of Article 14 of the Constitution of India. Since it is specifically pleaded by the writ petitioners that import pass fee is not regulatory, and if it is a regulatory one, then the extent of regulation in respect of imported ENA and ENA produced within the State is one and the same. The policy, licence and the issue of permits etc., are one and the same for both categories, therefore, the State Government cannot discriminate between ENA produced locally and ENA purchased outside the State of Andhra Pradesh. To buttress the said submission, reliance is placed on the judgment of the Supreme Court in M/s. Khoday Distilleries Ltd. etc. Vs. State of Karnataka and others,

8. Section 2(19) of the Act defines ''intoxicant'' includes liquor which includes (a) spirits of wine, denatured spirits, methylated spirits, rectified spirits, wine, beer, toddy and every liquid consisting of or containing alcohol; and (b) any other intoxicating substance which the Government may, by notification, declare to be liquor for the purposes of this Act. "Rectified Spirit" has been defined under Rule 2(k) of the A.P. Rectified Spirit Rules, 1971, which means liquor containing undenatured alcohol of a strength not less than 50% over proof and includes absolute alcohol in other forms and Extra Neutral Alcohol (ENA). Chapter III of the Act deals with Import, Export and Transport of intoxicant. Section 9 prohibits importation of intoxicant except under a permit subject to such restrictions and conditions to ensure the collection of the excise duty or countervailing duty. Section 10 deals with export of intoxicant, which we are not concerned. Section 11 deals with regulation of transport of intoxicant, where the State Government may, by notification, prohibit or regulate the transport of an intoxicant or any kind of intoxicants from any area into any other area within the State or from any place outside the State to any other place outside it through the intervening area lying within the State, except under a permit issued u/s 12. Section 12 provides issuance of permits for transport of intoxicants, either general or definite period. According to sub-section (3) of Section 12 permit should specify the name of the person authorized to transport intoxicants; the period for and the route through which the permit shall be valid; the quantity, strength and description of intoxicants for which it is issued; and any other particulars and conditions which may be prescribed. Chapter IV deals with manufacture, possession and sale of intoxicants etc.

9. From the scheme of the Act, as referred to above, it is always open for the State Government to regulate transportation of intoxicant including ENA as it falls within the definition of "rectified spirit".

10. The Supreme Court in M/s. Devans Modern Brewaries Ltd.''s case (supra), considered the imposition of import fee on beer vide Order I-D (iii) of the Punjab Excise Fiscal Orders 1932 from time to time and also considered the enhancement of import fee from Rs. 2/- per proof litre to Rs. 5/- on Indian Made Foreign Liquor (IMFL) by the State of Kerala. The High Court of Punjab and Haryana allowed the writ petition quashing the imposition of import fee. So also, the Division Bench of Kerala High Court dismissed the writ appeals confirming the judgment of the learned Single Judge upholding that enhancement of import fee is a fee and regulatory in nature. On appeals, Justice A.R. Lakshmanan speaking for the majority held that Articles 301 and 304 of the Constitution of India are not attracted to the present case as the imposition of import fee does not, in any way, restrict trade, commerce and intercourse among the States, and the permissive privilege to deal in liquor is not a "right" at all. His lordship held that the levy charged for parting with that privilege is neither a tax nor a fee but it is simply a levy for the act of granting permission or for the exercise of power to part with the privilege after referring to decisions in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , and Panna Lal and Others etc., etc., Vs. State of Rajasthan and Others, . It was further held that Articles 301-304 will be rendered inapplicable at the threshold to the activity in question. Further there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these Articles to be inapplicable to trade, commerce and intercourse in liquor. After referring to the judgment in The State of Bombay Vs. R.M.D. Chamarbaugwala, it was further held in M/s. Devans Modern Brewaries Ltd.''s case (supra), held that it is clearly demonstrated as to how and why Articles 301-304 are inapplicable to liquor trade in any form. In view of the discussion made in the earlier paragraphs, dealing with the case of the judgment of the Division Bench of Kerala High Court wherein the said Division Bench confirmed the judgment of the learned Single Judge therein upholding the enhancement of import fee from Rs. 2/- per proof litre to Rs. 5/- on Indian Made Foreign Liquor, and the conclusion of the Supreme Court in Para 22 of the judgment in M/s. Devans Modern Brewaries Lid''s case (supra), it is not necessary to deal with or refer to all the judgments cited, as in our view, the real questions in this case as contended by the licensees are that the State has no authority to impose the import fee and that it is violative of Articles 301 and 304 of the Constitution. Repelling the contention of the licensee that once a L-1 wholesale liquor licence is issued to him the State''s permissive privilege in respect of liquor stands permanently parted with and therefore no additional or further levy of any kind even in respect of activities other than wholesale selling under L-1 licence can be made, the Supreme Court in Para 23 of M/s. Devans Modem Brewaries Ltd.''s case (supra), held that import fee levied in the said case is fully authorised by the 1914 Act and delegated legislation thereunder and is clearly intra vires and the said provisions confer ample regulatory power upon the excise authority to regulate several activities related with liquor in any reasonable manner and in particular to regulate its import, and in Para 24 of the

said judgment it was held that even if the Act does not specifically provide for the levy in question by name still the statute must be held to provide authority for its imposition by delegated legislation and the levy is actually imposed by the delegated legislation made under, the Statute and the same would be valid and not ultra vires. In Bar Shankar and others etc. v. Deputy Excise and Taxation Commissioner and others etc. (supra), the unequivocal principle laid down is issuance of liquor licence constitutes a contact between the parties i.e., between Excise Authorities on the one hand and the individual applicant contractor on the other. After referring to the case of Government of Maharashtra and Others Vs. Deokar''s Distillery, wherein it was held that the establishment charges demanded are in the nature of price for parting with the privilege to permit manufacture and sale of liquor, and the privilege exclusively vests with the Government, and after referring to the Kalyani Stores v. The State of Orissa (supra), wherein it was stated that the Constitution Bench has not adverted to the issue of liquor trade being res extra commercium and has simply considered whether Articles 301/304 are violated or not, allowed the appeals setting aside the judgment of the Punjab and Haryana High Court upholding imposition of levy and confirmed the judgment of the Kerala High Court.

11. Sri S. Ravi, learned Senior Counsel for the writ petitioners was emphatic in his submission that the Supreme Court in M/s. Devans Modern Brewaries Ltd.''s case (supra), has not overruled the principle laid down in Kalyani Stores''s case (supra), and since both the Benches are equal in number, the principle laid down in Kalyani Stores''s case (supra), is still applicable to the facts of the present case.

12. We do not see any merit in the above submission for the reason, once the Supreme Court in a latter judgment considering its earlier judgment, even Bench constituted less in number, referred and explained the earlier judgment; latter judgment will have to be followed. For example, a seven Judges-Bench of the Supreme Court in Samsher Singh Vs. State of Punjab and Another, , dealt with the question with regard to termination of probationer as explained by a three-Judges Bench in Oil and Natural Gas Commission and Others Vs. Dr. Md. S. Iskender Ali, holding that termination of probationer appointed in temporary post after dropping enquiry against him, once the work of probationer was never satisfactory, termination did not attract Article 311(2) of the Constitution. It has been followed subsequently by two Judges-Bench in Union of India v. P.S. Bhatt, AIR 1981 SC 957.

13. In view of the authoritative pronouncements, Articles 301 and 304 will not attract to the permissive privilege granted to deal with the liquor, and the finding of the learned Single Judge that levy of import pass fee on ENA cannot be imposed in view of Article 304 of the Constitution of India cannot be upheld and the ratio laid down in Kalyani Stores''s case (supra), is not applicable to res extra commercium.

14. Learned Counsel for the writ petitioners contended that levying import pass fee cannot be sustained in view of Article 14 of the Constitution of India stating that the

policy, licence and the issue of permits etc., are one and the same for both categories. In respect of ENA produced locally and ENA produced outside the State of Andhra Pradesh, while imposing fee as a regulatory measure, the State cannot discriminate between ENA produced locally and ENA produced outside the State of Andhra Pradesh. In support of the same, reliance has been placed on the judgment of the Supreme Court in M/s. Khoday Distilleries Ltd.''s case (supra).

15. We do not find any merit in the above submission in view of the categorical finding that the trade in liquor is res extra commercium and State has exclusive privilege to deal with it and citizens have no right in that regard. Since it is the exclusive privilege of the State to manufacture IML, it can, by guidelines, restrict the import of raw material like ENA from other States as a policy to encourage local industries, which manufacture ENA. Equally, it can discourage export of raw material from the State of Andhra Pradesh to other States. Therefore, once the State has parted its privilege, and since it is a policy matter, it can always see that the locally produced ENA, which is a raw material for manufacture of IML, will be utilised for manufacture of IML locally to encourage local industry produces ENA by discouraging the import of ENA by imposing import pass fee, as it did in the instant case. In view of the same, the principle laid down in M/s. Khoday Distilleries Ltd.''s case (supra), cannot be made applicable to the policy decisions, when it is not shown as arbitrary or irrational. For the reasons aforementioned, we allow the writ appeal setting aside the judgment of the learned Single Judge. Consequently, WP No. 12607/2003 shall stand dismissed. There shall be no order as to costs.