Eastern Drug Company Limited Vs The State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: Dec. 1, 1972

Acts Referred: Bengal Excise Act, 1909 â€" Section 2, 86
Constitution of India, 1950 â€" Article 226, 265, 268, 277
Medicinal and Toilet Preparations (Excise Duties) Act, 1955 â€" Section 2, 2(g), 3, 4, 6

Citation: 77 CWN 382

Hon'ble Judges: Sabyasachi Mukharji, J

Bench: Single Bench

Advocate: Arun Kumar Dutt, for the Appellant; P.K. Sengupta, for the Respondent

Judgement

Sabyasachi Mukharji, J.
The petitioner in this case is engaged in the manufacture and sale of medicinal preparations containing alcohol

having the chemical formulae C2H5OH. For the manufacture of these medicinal preparations the petitioner Company contends that it has to

consume heavy quantities of alcohol in the form of rectified spirit which is used in different stages. In the primary stage the crushed medicinal herbs

and other drugs are put in the liquid alcohol to extract active principles present in the said medicinal herbs. According to the petitioner, this is an

intermediate stage or semi-manufactured stage and the products so obtained are not ''Medicinal Preparations'' as denned in sub-section (g) of

section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 being Act XVI of 1955. The petitioner further states that after their

extractions they are added to and mixed up in solution with chemicals to make final medicinal preparations which are sold in the market under

different proprietory names. The petitioner company has been holding L-2 licence granted by the Government of Bengal (now West Bengal) and

later they were in possession of another additional licence L-1 for manufacture of medicinal preparations containing alcohol of ''In Bond'' granted

by the same government. The petitioner further states that on the strength of these two licences the petitioner purchased rectified spirit from

different distilleries and warehouses. The Government of West Bengal collected excise duties on ""medicinal preparations"" containing alcohol

manufactured in the petitioner''s factory with the said alcohol. The petitioner further submits that these are defined in subsection 7 of section 2 of

the Bengal Excise Act, 1909 (Act V of 1909) as ""Excisable articles"" and ""medicinal preparations containing alcohols"". The petitioner contends that

the levy and realisation of duties on these medicinal preparations by the Government of West Bengal were illegal and without any jurisdiction.

According to the petitioner, the State Government has no such power in view of Entry 84 of the List I of the Sevneth Schedule in the Constitution

of India. The petitioner states that Entry No. 51 of the List II of the Seventh Schedule to the Constitution of India excluded the jurisdiction of the

State Government to levy and collect excise duties on Medicinal Preparations containing alcohol. The effect, according to the petitioner, of the

enactment of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 (Act No. XVI of 1955) by the Parliament read with Rule 143

framed under the Act was that all state enactments and rules framed thereunder were repealed and the State Governments were completely

prohibited from levying and collecting excise duties on Medicinal Preparations containing alcohol. Inspite of the same according to the petitioner,

the Government of West Bengal continued to levy and collect excise duties on the plea that the Semi-manufactured or intermediate products which

are not covered by the said Act are liable to excise duties in accordance with the provisions of the Bengal Excise Act, 1909. As a result of section

64 of the Finance Act, 1964 (Act V of 1964) the excise duties on Medicinal Preparations containing alcohol were enhanced to 10% ad valorem

from the rates fixed by Section 3 of the Act XVI of 1955 and for the purpose of assessment levy and collection, by the said section of Act V of

1964, the section 4 of the Salt and Excise Act 1944 (Act I of 1964) was made applicable. The petitioner states that the L-1 and L-2 licences

which had been granted by the Government of West Bengal were revalidated by the Act XVI of 1955. According to the petitioner, by virtue of

sub-section (b) of Section 2 of the Act XVI of 1955 read with Article 268 of the Constitution of India, the State Government while assessing

levying and collecting excise duties in accordance with the said Act should always collect them in accordance with these provisions. According to

the petitioner, by virtue of section 4 of the Act I of 1944, namely the Salt and Excise Act, 1944, the articles of like kind and quality must be

dutiable and must have selling value in the market or capable of being sold in the market and the semi-manufactured goods in the process of

manufacture have neither any market value nor are they capable of being sold in the market. The petitioner further states that when the Semi-

manufactured goods or intermediate products are added in solutions to make the final products, the excise duties are again assessed, levied and

collected on the final product at the rate of ten percent ad valorem, as a result, according to the petitioner, the petitioner is subjected to the double

taxation on the very same products. The petitioner further states that on or about 26th July 1968 when the petitioner surrendered L-2 licence and

commenced manufacturing with duty paid alcohols under L-1 licence, the excise duty was assessed, levied and collected by the Government of

West Bengal at the time of their sales from the warehouses. According to the petitioner, when the final medicinal products are made the duty so

paid is deducted from the total ad-valorem duty payable on such products and section B of Chapter IV of the Rules framed under Act XVI of

1955 does not provide for any such procedure. Further more, the Bengal Excise Act, 1909, according to the petitioner, does not provide for levy

and collection of excise duties on behalf of another Government and in view of the provisions of Article 265 of the Constitution of India mere legal

authority was not sufficient but there must be procedure laid down for the levy and collection of taxes. According to the petitioner the Bengal

Excise Act, 1909 does not provide for levy or collection of excise duties, on behalf of another government.

2. The main grievance of the petitioner in this application is that a sum of Rs. 70,360.30 has been illegally realised from the petitioner on

intermediate products in violation of the Act XVI of 1955. The petitioner claims refund of the same. The next grievance of the petitioner is that for

the purpose of propaganda and publicity of the Medicinal Preparations containing alcohol the same are distributed by salesman free of cost. These

do not have any market value nor are these capable of being sold in the market. Further more, there are wastages, breakages of the products

which have also no market value. But the petitioner have been forced to pay duties on Physicians'' free sample and upto 28th March, 1969, this

comes to about Rs. 16,150.80 p. The petitioner contends that such realisation of the duties by the respondents was illegal and improper, and the

petitioner is entitled to refund of the same. The third grievance of the petitioner is on the ground that as ''Establishment Charges'' an amount of Rs.

23,441.56 p. was realised by the Government. The L-1 licence is for the Bonded Laboratory. In the said licence the petitioner company used to

bring in the rectified spirit inside the Bonded Laboratory situated in the factory premises. The Government of West Bengal was realising from the

petitioner the salary and wages, house rent etc. of the staff who had been posted at the Bonded Laboratory inside the factory premises. These

were realised by the Government us ''Establishment Charges'', but according to the petitioner, the rules framed under the Act XVI of 1955 do not

provide for any such realisation. On this point the petitioner contends that the action of the government is illegal and it has unlawfully realised as

''Establishment Charges'' Rs. 23,441.56 p. and the petitioner claims direction for the refund of the same. According to the petitioner, the

Commissioner of Excise, Government of West Bengal and the employees under him, in order to retaliate for the demand of the petitioner for the

refund of the illegal collection, mentioned hereinbefore, began a thorough examination of the stocks maintained by the petitioner-company, and

being unable to find discrepancies anywhere stopped supply of rectified spirit which was essential for the manufacture of the medicinal preparations

containing alcohol and this was done in contravention of Rule 18 framed under Act XVI of 1955. On the 10th March, 1970, the petitioner-

company served a lawyer''s notice and on the 13th March, 1970 by a letter dated 13th March, 1970, the respondent No. 2 asked the petitioner to

show cause, threatening cancellation of licence and imposing penal duties and it was directed that the petitioner should pay the duties of Rs.

48,797-86. The petitioner thereupon moved this Court under Article 226 of the Constitution. On 25th March, 1970, and obtained a rule nisi. In

this application the petitioner claims writ in the nature of mandamus against the respondents asking them to refund all the amounts on account of the

illegal assessments, levy, and collection of excise duties on goods which are not provided for in the Act XVI of 1955 and collection of other

charges made in violation of the provisions of the Constitution of India. this Court issued a rule nisi and directed that upon the petitioner furnishing

the security for the amount claimed by the letter dated 13th of March, 1970 the respondents would be restrained from interfering in any manner

with the manufacture and sale of the products of the petitioner-company, mentioned in the petition.

3. Therefore three points or questions require consideration in this case, namely--(a) whether realisation of duty by the State of West Bengal on

what the petitioner calls the intermediary products was legal and valid, (b) whether administrative or establishment charges have been properly or

validly realised by the Government and (c) thirdly, whether duty was payable on what the petitioner''s describe as physician''s samples or

breakages. So far as the administrative or establishment charges are concerned the case of State of West Bengal is that the petitioner had in

addition to L-2 licence from the 1st April, 1964 to 31st July, 1969 a further licence under L-1 as well as a licence in Form 28B to establish a

private warehouse and under that licence under rule 22 of the consolidated Rules made u/s 86 of the Bengal Excise Act, 1909 was liable to pay to

Govt. a monthly fee equivalent to the cost of officers and establishment employed at the said private warehouse. This was one of the points

decided by a decision of B.N. Banerji, J. in the case of (1) Indian Research Institute Private Ltd. v. Commissioner of Excise, West Bengal on

November, 17th, 1965. On the basis of the decision of the Supreme Court in the case of (2) Hyderabad Chemical and Pharmaceutical Works

Ltd. etc. Vs. State of Andhra Pradesh and Others, it was held by B.N. Banerji, J. in the aforesaid case that so much of the Bengal Excise Act and

the rule as related to storage and use of alcohol in the manufactory of the petitioner stood repealed and the petitioner was not bound to take out

any licence under the Bengal Act or to pay any charges thereunder. The petitioner is, therefore, entitled to refund of the sums paid on account of

establishment charges after the coming into operation of the Central Act, that is to say, 1st of April, 1957 to the date of this application. The

petitioner has claimed a particular sum of money, namely Rs. 23,441-56. The petitioner is entitled to have an account of the amount paid on

account of the ''Establishment Charges'' under the Bengal Act after 1st of April, 1957 and to a refund of the same. I direct accordingly. The

respondent, has on the other hand, claimed a further sum from the petitioner on this account of Establishment Charges under the licence under the

Bengal Act in Form No. 28B. The respondent is not entitled to the same. I must observe however that this direction of mine is following the

decision of B.N. Banerji, J. referred to hereinbefore. No argument was advanced before me as to the correctness or otherwise of the said decision

and for the purpose of this application, sitting as I am singly, I merely follow the said judgment. I understand the said judgment is under appeal. I

need not express my personal views on this aspect of the matter.

4. The next question that requires consideration in this case is whether the petitioner is entitled to refund of Rs. 70,360-30 on account of what is

alleged to be intermediate products. After the coming into operation of the Constitution in view of the provisions of Article 277 thereof and the

enactment of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955 the position is that the Excise Acts of the various States under which

duty was being levied on medicinal and toilet preparations containing alcohol must be deemed to have been repealed in so far as they applied to

such medicinal and toilet preparations. This position has also explained in the decision of (3) M.B.S. Oushadaylaya v. Union of India, AIR (1963)

S.C. 622. But prior to the enactment of the aforesaid Act in view of the provisions of Article 277 and Article 268 and in view of the provisions of

the Bengal Excise Act, 1909 the State Government had the power and authority to levy and also to collect duties of excise in respect of medicinal

preparations containing alcohol. The case of the respondent as made out in the affidavit of Somendra Mohan Mukherjee is that since the coming

into operation of the said Central Act on 1st of April, 1957, the State Government has been collecting excise duties on medicinal preparations

containing alcohol in conformity with the provisions of the same Act, as it had the authority to do so under Articles 268 and 277 of the

Constitution. The Finance Act, of 1964 introduced a new rate of taxation and medicinal preparations containing alcohol which were not capable of

being consumed as alcohol beverages were subject to duty in the manner indicated in the taxing schedule of the said Finance Act which have been

set out in paragraph 9, sub-paragraph (a) of the affidavit of the respondent. No excise duty, according to the respondent has been realised in

contravention of the said Central Act. The main grievance of the petitioner seems to be that there has been taxation on what is called intermediate

or semi manufactured products. Section 6 of the Medicinal and Toilet Preparations Duties Act, 1955 provides that no person shall engage in the

production or manufacture inter alia of any medicinal preparations containing alcohol except under the authority and in accordance with the terms

and conditions of a licence granted under the said Act in such form as may be prescribed and Rule 9 of the rules made under the said Act provides

that no medicinal preparation containing alcohol shall be removed from any place where it is manufactured, whether for consumption or for

manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid. The Central Rules also

prescribed two kinds of licences, namely, licence in Form--L-1 and Licence in Form L-2. Licence in Form L-1 authorises the manufacture of

medicinal preparations containing alcohol in a bonded manufactory, that is to say, with alcohol on which duty of excise was leviable under any law

for the time being in force and has not been paid, subject, however, to the payment of duties of excise prescribed on such preparations by the

schedule to the Central Act in accordance with the provisions of rule 9 of the Central Act. Licence in Form L-2, authorises the manufacture of the

said preparations in a non-bonded manufactory, that is to say, with alcohol on which the specific duties prescribed in respect of the said

preparations have already been paid in accordance with the provision of Rule 49 of the said Central Rules and subject to the payment of further

duty, if any, prescribed upon such preparations by the said Central Act in accordance with the provision of Rule 9 of the Central Rules. The

petitioner had a licence in Form L-2 from 1st of April, 1957. It has been categorically denied that any such semi manufactured goods or medicine

have been subject to tax. If alcohol is added in the manufacture of a thing which is known as medicine, the fact that the further product is mixed to

something else to produce another medicinal product does not make the first stage an intermediatory stage in the manufacture of medicinal

preparations, as contemplated by the Act and the Rules. It has to be borne in mind that duty under the Excise Act is on manufacture and not on

sale. Actual sale therefore is immaterial. The manufacture, however, must be of the medicinal preparations, as defined in 2 (g) of Act XVI of 1955.

Reliance may be placed for this proposition on the decision of the Supreme Court in the case of (4) South Bihar Sugar Mills Ltd., etc. Vs. Union

of India (UOI) and Others, . Manufacture again implies a change, but every change in the raw material is not manufacture. It must bring into being

something known in the market according to its ordinary dictionary meaning. If in the process a thing ordinarily known in the market as a thing or a

good or a preparation is brought into being, the fact that it is an intermediatory process in the ultimate preparation of some other medicinal product,

would not also make any difference. Reliance for this may be placed on the observations of the Supreme Court in the case of (5) Union of India v.

Delhi Cloth and General Mills, AIR 1963, SC 790. In order to attract duty all that is required is that there should be manufacture of medicinal

preparations and it should contain alcohol. If these two conditions are fulfilled, then duty is attracted and if these two conditions are fulfilled at an

intermediate stage, that makes no difference to the taxability. From that point of view in certain cases multipoint taxation is permissible and have

been contemplated by the scheme of the Central Act. The Central Act by section 4 permits rebate in certain cases in order to avoid the

consequences of multipoint taxation. In this connection reliance may be placed on the observations of the Supreme Court in the case of (6)

Baidyanath Ayurved Bhavan v. Excise Commissioner, U.P., (1971) S.C. 378. Judged from the aforesaid stand point the petitioner, in my opinion,

has not been able to establish in this Court that any semi-manufactured goods has been subjected to taxation, it may be that the final product of the

petitioner was subject to double taxation, as the petitioner contends, but until suitable amendment of the rules is made, giving the petitioner rebate

for the same for which the State Government has written to the Centre, the petitioner would be liable to pay the taxes. In this connection it may be

noted that in the paragraph 3 of the petition it has been stated that in the primary stage the ""crushed medicinal herbs and other drugs"" are put in the

liquid alcohol to attract active principles in the said medicinal herbs. Therefore on the statement of the petitioner it is clear that alcohol is added to

medicinal herbs"" and ""other drugs"". There is nothing to indicate that these medicinal herbs and drugs are not medicinal preparations in accordance

with the definition of Section 2(g) of the Act. On the other hand the correspondence annexed to the affidavit in opposition indicate that the

petitioner all along proceeded on the basis that there are medicinal preparations, I am, therefore, unable to accept the grievance of the petitioner

that a sum of Rs. 70,360.30 had been illegally realised on intermediate products in violation of the Act XVI of 1955. On the other hand the case of

the respondents is that the petitioner is liable to pay a further sum about which notice has been given which is the subject-matter of the challenge in

this application.

5. So far as the liability of the petitioner on the physician''s free sample or breakages, are concerned, the Act does not permit any rebate or

relaxation of taxability if on manufacture duty is attracted whether these goods are sold actually or are used as samples. Therefore it is also not

possible to accept the grievance of the petitioner that physician''s free sample and breakages should be exempted from duty unless the Act and the

Rules are amended.

6. I am also unable to accept the contention of the petitioner that there is no sanction for the procedure for realisation of the dues under the Central

Act by the State Government. Article 268 of the Constitution read with Article 277, the Central Act XVI of 1955 read with rules made

thereunder, the Bengal Excise Act, 1909 and the rules for the licence read in conjunction, in my opinion authorise such a procedure. In the

premises it appears that only except in respect of ''Establishment or Administrative Charges'' the petitioner is entitled to a refund; the other claims

and grievances made by the petitioner can not succeed. I, therefore, direct that an account should be taken of the Establishment or Administration

Charges realised from the petitioner from 1st of April, 1957 and that amount should be deducted from the liability of the petitioner to the

government under the Central Act which the State Government is entitled and competent to enforce and realise. After such an account is taken, the

petitioner will be liable to pay the balance to the respondents and the letter dated 13th of March, 1970 and 12th of March, 1970 annexed to the

petition, should not be given effect to, without carrying out the aforesaid direction, but subject to the claim of the petitioner for the refund of the

Establishment and Administrative Charges, the petitioner would be liable to pay other amount due to the respondents on account of the Excise

Duty and the respondents would be entitled to take such in action as they are entitled under the law as indicated in the letters dated 12th and 13th

March, 1970. The rule succeeds only to that limited extent. The rest of the prayers are rejected. Let a writ in the nature of mandamus issue

directing the respondents Nos. 1 to 3 to take an account of the Administrative Charges or Establishment Charges realised from the petitioner from

1st of April, 1957 and claim the dues from the petitioner and take action under the Act XVI of 1955, after giving the petitioner credit for the said

Administrative Charges, realised by the Government in accordance with law. There will be no order as to costs of this application. The rule against

respondent No. 4 discharged without any order as to costs.