

**NON-REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NOS.5666-5668 OF 2009**

**STATE OF ORISSA & ORS.**

**...APPELLANT(S)**

**VERSUS**

**M/S UTKAL DISTILLERIES LTD.**

**.... RESPONDENT(S)**

**J U D G M E N T**

**B.R. GAVALI, J.**

**1.** The present appeals challenge the common judgment and order passed by the High Court of Orissa, Cuttack, dated 5<sup>th</sup> December, 2008, in O.J.C. No.9369 of 1998, W.P.(C) No. 3097 of 2003 and W.P.(C) No. 7108 of 2005, thereby allowing the said writ petitions filed by the respondent-Company and setting aside the demand notices issued by the appellants.

**2.** The facts, in brief, giving rise to the present appeals are as under:

**3.** The appellant No. 2–Commissioner of Excise, Orissa, vide order dated 12<sup>th</sup> September, 1990, granted licence in favour of the respondent-Company for manufacturing, bottling, blending and reduction of Indian Made Foreign Liquor (hereinafter referred to as ‘IMFL’) from rectified spirit. The license was granted with the condition that the respondent-Company shall install one rectification column to rectify/purify the rectified spirit to be used in manufacturing of IMFL.

**4.** It is not in dispute that as per the condition in the license, the respondent-Company installed Extra Natural Alcohol Column (hereinafter referred to ‘ENA Column’). It is the case of the respondent-Company that the said ENA Column installed by it was the first of its kind in the State of Orissa. It was the case of the respondent-Company that the manufacturing process resulted in generation of certain weak spirit, which was not potable, and since the rules did not provide for allowing such a waste product, a representation

was made by the respondent-Company to the appellant No.2 on 19<sup>th</sup> August, 1992. Accordingly, the appellants constituted a Technical Committee (hereinafter referred to as “the Committee”) on 21<sup>st</sup> November, 1992, to examine the following issues:

- “i) to examine the details of E.N.A. columns including stock of spirit inside the same.
- ii) Loss during trial run along with the limit of wastage during the E.N.A. process adopted by M/s Utkal Distillery Pvt. Ltd. at Brahmapura Khurda in the district of Puri.”

**5.** The Committee submitted its report on 17<sup>th</sup> June 1993. The Committee found that though there were provisions in the Boards’ Excise Rules, 1965 for loss of spirit during transit, during storage, and during bottling, there was no provision for loss of spirit during re-distillation. The Committee found that the loss of spirit during the process of re-distillation was allowed in different States. In Maharashtra, a loss of 2%; in Bihar, a loss of 1.5%; in

Andhra Pradesh, a loss of 2%; and in Karnataka, a loss of 3% spirit was allowed during re-distillation. Accordingly, the Committee recommended allowing 2% loss of spirit during the process of re-distillation in the State of Orissa.

**6.** Since the appellant No.1-State of Orissa, had not taken any decision on the report of the Committee, a writ petition being O.J.C. No.8635 of 1994, came to be filed by the respondent-Company, for a direction to the appellant No.1 to take a decision on the report of the Committee. The said writ petition came to be disposed of by the High Court of Orissa vide order dated 10<sup>th</sup> January, 1995, with a direction to the appellant No.1 to take a decision on the report of the Committee. The appellant No.1 was further directed to communicate the decision to the concerned parties within a period of three months from the date of the decision. The appellant No.1, vide communication dated 11<sup>th</sup> January, 1995, informed the respondent-Company that the Government has decided to allow 2% process loss while re-

distilling the rectified spirit. However, demand notice dated 26<sup>th</sup> September, 1997, was issued to the respondent-Company, calling upon it to pay excise duty on the weak spirit, which was more than 2% allowable wastage.

**7.** After receipt of the demand notice, the respondent-Company made a representation to the appellants, stating therein that the wastage generated during rectification process was an impure spirit/weak spirit, which was not fit for human consumption. It was, therefore, contended that the State Government has no authority to impose excise duty on the weak spirit. The said representation was not responded to and another demand notice was issued on 8<sup>th</sup> July, 1998. The respondent-Company, therefore, filed a writ petition being O.J.C. No.9369 of 1998. By an interim order, the High Court stayed the demand notices.

**8.** It appears that in the meantime, the sample of the weak spirit was sent for chemical examination to the Chemical Examiner to the Government of Orissa and Deputy

Drugs Controller. In the report of the Chemical Examiner dated 12<sup>th</sup> August, 1999, the sample was found unfit and unsafe for human consumption.

**9.** Two more demand notices dated 12<sup>th</sup> March, 2003 and 20<sup>th</sup> May, 2005, were issued to the respondent-Company, which were challenged by it before the High Court of Orissa by way of Writ Petitions being Writ Petition (Civil) No.3097 of 2003 and Writ Petition (Civil) No.7108 of 2005 respectively.

**10.** All the three writ petitions were finally decided together by the High Court on 5<sup>th</sup> December, 2008, thereby allowing the said writ petitions, as aforesaid. Being aggrieved, the present appeals are filed.

**11.** We have heard Shri M.N. Rao, learned Senior Counsel appearing on behalf of the appellants and Shri Soumyajit Pani, learned counsel appearing on behalf of the respondent.

**12.** Shri M.N. Rao, learned Senior Counsel appearing on behalf of the appellants submits that the Committee was

constituted on the basis of the representation of the respondent-Company. He submitted that once the Committee had recommended allowing of wastage only to the extent of 2%, it was not permissible for the respondent-Company to submit that the demand of excise duty on weak spirit, which was more than 2%, is not tenable. He submitted that the High Court has erred in allowing the writ petitions.

**13.** Shri Soumyajit Pani, learned counsel appearing on behalf of the respondent, on the contrary, submits that the issue is no more *res integra*. The Constitution Bench of this Court, consisting of seven Judges, in the case of ***Synthetics and Chemicals Ltd. and others vs. State of U.P. and others***<sup>1</sup> has held that the State Legislature had no authority to levy duty or tax on industrial alcohol, which is not fit for human consumption as that could only be levied by the

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<sup>1</sup> (1990) 1 SCC 109

Centre. He, therefore, submits that there is no reason to interfere with the impugned judgment and order.

**14.** It is not in dispute that the license, which was granted to the respondent-Company, is for the purpose of manufacturing, bottling, blending and reduction of IMFL. It is also not in dispute that as required under the license, the respondent-Company has installed one ENA column to rectify the rectified spirit to be used in the manufacturing of IMFL. It is also not in dispute that the sample of wastage generated in the manufacturing process was sent for examination to the State Drugs Testing and Research Laboratory, Orissa. The Chemical Examiners also submitted their report on 12<sup>th</sup> August, 1999. It will be relevant to reproduce the opinion of the Chemical Examiners, which is as under:

“The subject sample of Weak Spirit has been tested for limit tests and Ethyl Alcohol content- 54.8 O.P. and found not to have passed limit tests for Acidity, Aldehydes, Fusel Oil and Furfural as per I.S.-323-1959 for rectified Spirit and hence considered to be unfit and unsafe for potable purpose.”



**15.** It is thus clear that the wastage generated has been found to be unfit and unsafe for potable purpose.

**16.** The Constitution Bench of this Court in the case of ***Synthetics and Chemicals Ltd.*** (supra) was considering the issue, as to whether the States are entitled to levy excise duty in respect of industrial alcohol. Different legislations in the different States dealing with such a power of the State Government came up for consideration before the Constitution Bench of this Court in the said case. The Constitution Bench observed thus:

**“95.** It was also contended that the State ultimately falls back on the consideration for parting with the privilege to sell alcoholic liquors which has been the basis of series of decisions of this Court based on English and American decisions but according to the learned counsel for the petitioners this doctrine of privilege and consideration for sale of privilege also could be available to the State only in respect of alcohol or alcoholic liquors which are for human consumption. According to the learned counsel by merely widening the definition of intoxicating liquors in re-

spective excise laws enacted by the States the ambit of authority of taxation could not be enlarged by the State legislature when in List II Entry 51 the words used are alcoholic liquors for human consumption. Entry 84 in List I reads:

“84. Duties of excise on tobacco and other goods manufactured or produced in India except—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics,

but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.”

**96.** Entry 51 in List II reads:

“51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but not including medicinal and toilet preparations containing alcohol or any

substance included in sub-paragraph (b) of this entry.”

**97.** A comparison of the language of these two entries clearly demonstrates that the powers of taxation on alcoholic liquors have been based on the way in which they are used as admittedly alcoholic liquor is a very wide term and may include variety of types of alcoholic liquors but our Constitution-makers distributed them into two heads:

(a) for human consumption

(b) other than for human consumption

Alcoholic liquors which are for human consumption were put in Entry 51 List II authorising the State legislature to levy tax on them whereas alcoholic liquors other than for human consumption have been left to the central legislature under Entry 84 for levy of duty of excise. This scheme of these two entries in Lists I and II is clear enough to indicate the line of demarcation for purposes of taxation of alcoholic liquors. What has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation.

**98.** Entry 8 in List II reads:

“8. Intoxicating liquors, that is to say, the production, manufacture, pos-

session, transport, purchase and sale of intoxicating liquors.”

This entry talks of intoxicating liquors and further on refers to production, manufacture, possession, transport, purchase and sale of these liquors. It appears that the State has levied some kind of duties in various names at each of these stages used in this entry, that is, production, manufacture, possession, transport, purchase and sale. But from the scheme of entries in the three lists it is clear that taxing entries have been specifically enacted conferring powers of taxation whereas other entries pertain to the authority of the legislature to enact laws for purposes of regulation. If we compare Entry 8 in List II with Entry 51 it is clear that when Entry 51 authorises the State legislature to levy tax and duties on alcoholic liquors falling in Entry 51, Entry 8 confers authority on the State legislature to enact laws for regulation. Similarly are entries in List I. As regards regulation or regulatory fees it was contended that Entry 52 in List I empowers the Parliament to declare the industries which the Union proposes to control in public interest under Industries Development and Regulation Act.

**99.** Entry 52 List I reads as under:

“52. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.”

**100.** Such a declaration is made by the Parliament and this industry that is industry based on fermentation and alcohol has been declared to be an industry under that Act and therefore is directly under the control of the Centre and therefore even in respect of regulation the authority of the State legislature in Entry 8 List II could only be subject to the Industries Development and Regulation Act or Rules made by the Centre.

**101.** Under these circumstances therefore it is clear that the State legislature had no authority to levy duty or tax on alcohol which is not for human consumption as that could only be levied by the Centre.”

**17.** It could thus be seen that the Constitution Bench has held that the Constitution makers distributed the term ‘alcohol liquor’ into two heads, viz., (a) for human consumption; and (b) other than for human consumption. It has been held that the alcoholic liquors, which are for human

consumption, are put in Entry 51 List II authorizing the State Legislature to levy tax on them, whereas alcoholic liquors other than for human consumption have been left to the Central Legislature under Entry 84 for levy of duty of excise. It has been held that what has been excluded in Entry 84 has specifically been put within the authority of the State for purposes of taxation. The Constitution Bench clearly held that the State Legislature had no authority to levy duty or tax on alcohol, which is not for human consumption as that could be levied only by the Centre.

**18.** A three Judge Bench of this Court in the case of ***State of U.P. and others vs. Modi Distillery and others***<sup>2</sup> was considering the power of the State Government to levy excise duty on wastage of liquor after distillation. Following the judgment of the Constitution Bench of this Court in the case of ***Synthetics and Chemicals Ltd.*** (supra), this Court observed thus:

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<sup>2</sup> (1995) 5 SCC 753

**“10.** What the State seeks to levy excise duty upon in the Group ‘B’ cases is the wastage of liquor after distillation, but before dilution; and, in the Group ‘D’ cases, the pipeline loss of liquor during the process of manufacture, before dilution. It is clear, therefore, that what the State seeks to levy excise duty upon is not alcoholic liquor for human consumption but the raw material or input still in process of being rendered fit for consumption by human beings. The State is not empowered to levy excise duty on the raw material or input that is in the process of being made into alcoholic liquor for human consumption.”

**19.** It could thus be seen that this Court held that the State was only empowered to levy excise duty on alcoholic liquor for human consumption. This Court held that the State has no power to levy excise duty on wastage of liquor after distillation.

**20.** Even the perusal of Section 27(1) read with Section 2(6) of the erstwhile Bihar and Orissa Excise Act, 1915, (hereinafter referred to as ‘the said Act’), which governed the

field at the relevant time, would clarify the position. They are reproduced hereunder:

**“Section 2(6)**

**2. Definitions-** In this Act, unless there is anything repugnant in the subject or context;

(6) **“excisable article”** means-

(a) any alcoholic liquor for human consumption; or

(b) Any intoxicating drug;

**Section 27(1)**

**27. Power to impose duty on import, transport and manufacture -** (1) An excise duty or countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed either generally or for any specified local area, on

(a) any excisable article imported; or

(b) any excisable article exported; or

(c) any excisable article transported;  
or

(d) any excisable article (other than tari) manufactured under any licence granted in respect of Clause (a) of Section 13; or



- (e) any hemp plant cultivated, or any portion of such plant collected, under any licence granted in respect of Clause (b) or Clause (c) of Section 13; or
- (f) any excisable article manufactured in any distillery or brewery licensed, established, authorised or continued under this Act.

**Explanation** - Duty may be imposed on any article under this subsection at different rates according to the places to which such article is to be removed for consumption, or according to the varying strengths and quality of such article.”

**21.** Perusal of Section 27(1) of the said Act would reveal that the State’s power to impose duty on import, export, transport and manufacture is only in respect of any excisable articles imported, exported, transported and manufactured. ‘Excisable article’ has been defined to be any alcoholic liquor for human consumption or any intoxicating drug. It is thus clear that even under the relevant statute, the State has

power to levy excise duty only in respect of the alcoholic liquor for human consumption.

**22.** In view of the legal position as settled by the Constitution Bench of this Court in the case of ***Synthetics and Chemicals Ltd.*** (supra) and the three Judge Bench in the case of ***Modi Distillery*** (supra) and the statutory provisions contained in the said Act, we see no reason to interfere with the impugned judgment and order. The appeals, therefore, are found to be without merit and as such, dismissed. There shall be no order as to costs. All pending applications, if any, shall stand disposed of.

.....**J.**  
**[L. NAGESWARA RAO]**

.....**J.**  
**[B.R. GAVAI]**

**NEW DELHI;**  
**MARCH 03, 2022**