

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

OWPED No. 312/2000

IA No. 322/2000

Reserved on: 10.08.2023

Pronounced on: 24.08.2023

Gupta Modern Breweries

.... Petitioner/Appellant(s)

Through:- Mr. Pranav Kohli, Sr. Advocate with
Mr. Rahul Sharma, Advocate

V/s

State of J&K and others

.....Respondent(s)

Through:- Mr. K.D.S. Kotwal, Dy. AG.

CORAM: HON'BLE MRS. JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

JUDGMENT

01. The instant writ petition has been filed seeking quashment of inquiry report dated 14.03.2000 bearing Order No. 08/EXC of 2000 dated 10.04.2000 passed by respondent No. 2 and Demand Notice No. DECDJ/727-29 dated 25.04.2000 issued by respondent No. 4. The petitioner also seeks a direction upon the respondents to restrain them from making any recovery from the petitioner pursuant to impugned order dated 10.04.2000 and demand notice dated 25.04.2000. The petitioner has further challenged Rule 107 and 108 of Jammu & Kashmir Distillery Rules, 1946 being *ultra vires* to the Jammu and Kashmir Excise Act, 1958 and to the Constitution of India.

Brief facts of the case are as under:

02. The petitioner, a Small Scale Industrial Unit, is registered with District Industrial Centre, Jammu, which is duly licensed by respondent No. 2, i.e., Excise & Taxation Commissioner.

03. On 18th of November, 1991, a fire incident took place in the factory of the petitioner in which the contents of storage tank No. 4 also got involved, resulting in blowing away of the shed and lid of the tank due to pressure that built within the tank.
04. Due to the said incident, the spirit contained in Tank No. 4 got destroyed and damaged. The matter was reported to the Excise Department and a report was lodged with the police concerned. The Excise Department then ordered an enquiry in terms of Rule 108 of the Jammu & Kashmir Distillery Rules, 1946. The Excise and Taxation Officer (Enquiry Officer) who was the in-charge of M/s Gupta Modern Breweries, conducted an enquiry and submitted its report on 18.02.1992, stating therein that the spirit was destroyed due to the fire incident which took place due to short circuit in Tank No.4 and that the said incident was beyond petitioner's control.
05. The Audit report dated 31.07.1992, prepared by the Audit Party recommended that the loss of the liquor due to the alleged fire incident be examined by a committee of officers. Accordingly, a Committee comprising Deputy Excise Commissioner (Executive), Deputy Excise Commissioner (Accounts) and Deputy Excise Commissioner (Warehouse) was constituted in terms of letter dated 26.08.1992 for conducting an enquiry into the incident in question.
06. The Deputy Excise Commissioner (Executive), one of the members of the committee, informed the Excise Commissioner vide his letter dated 09.10.1992, that the loss of spirit had, in fact, occurred due to a fire incident.

07. It is further averred that, though, the Enquiry Officer and the Enquiry Committee have found that the damage was due to the fire incident but the Excise Commissioner came to a different conclusion, and by his order dated 06.07.1993, held that there was no loss of spirit due to fire incident and directed to recover the Excise Duty under Rule 108 of Jammu and Kashmir Distillery Rules.
08. Aggrieved of the order passed by Excise Commissioner on 06.07.1993, the petitioner filed the writ petition bearing OWP No. 739 of 1993 challenging the demand of the Excise Duty of 18,60,929.48/-. The said writ petition was disposed of by holding as under:

“11. It appears that petitioner has furnished a Bank guarantee with respect to the demand. In case the Commissioner wants to hold a fresh enquiry into the matter, he will pass appropriate order within a period of two months from the date copy of this order is received by him, failing which, bank guarantee shall stand released. In case, fresh enquiry is ordered, same may be completed within a period of three months after the same is constituted and final decision taken within one month thereafter. In case, no enquiry committee is constituted, the bank guarantee shall stand released and in case it is constituted the Excise Commissioner will take a decision within one month after receipt of the report, failing which, also the bank guarantee shall stand released in favour of the petitioner.”

09. As the respondents were directed to hold a fresh enquiry, the same was conducted and pursuant to the enquiry report dated 14.03.2000, the impugned order dated 10.04.2000 has been passed directing the petitioner to pay an amount of Rs. 14,15,155.50/- as Excise Duty on 30,764.25 LPL of rectified spirit, @ Rs. 46/- per LPL. Subsequently, a demand notice dated 25.04.2000 was issued by the respondents.

10. The Petitioner has challenged the impugned orders dated 10.04.2000 and 25.04.2000, on the ground that the Excise Commissioner had conducted *de novo* enquiry which he was not competent to do in terms of Rule 108 of Jammu and Kashmir Distillery Rules.
11. It is averred that, in case, the Excise Commissioner was not in agreement with the report of the Enquiry Committee, he could have directed to conduct a fresh enquiry in accordance with rules but the Excise Commissioner, without conducting any enquiry, on his own, penalized the petitioner to pay the Excise Duty in terms of the impugned orders even without affording any opportunity of being heard to the petitioner. It is further stated that no Excise Duty can be levied on rectified spirit which is a raw material and not fit for human consumption.
12. *Per contra*, the respondents in their reply have stated that petitioner suffered a loss to the tune of Rs.5000 only, as reported by the Fire Services Department on account of electric short-circuit. It is also stated in the reply that the report of the Forensic Science Expert reflects the category of fire as 'small' because if the entire spirit in Tank No. 4 was exposed to fire, the tank would have blown up, exposing the entire area to risk of fire and damage but nothing of that sort had happened.
13. It is stated that the petitioner has been confronted with the report of Forensic Science Expert as well as the Fire Services Department but the petitioner has failed to submit any explanation to justify his stand for rejecting the report of Forensic Science Expert and Fire services Department.

14. It is stated that after the first enquiry report was set aside by this Court on 21.10.1999, another enquiry was conducted in which the petitioner was associated and was provided an opportunity to examine the witnesses, as such, the impugned orders are justified.
15. The petition, i.e., OWP No. 312 of 2000 was heard and was disposed of by this court on 10.12.2002 by holding as under:

“For the reasons given above, as it is manifestly clear that the entire contents of Tank No. 4 of the petitioner-Brewery, were consumed in the fire which took place on 18.11,1991, the enquiry report dated 14.03.2000, office Order No. 8/EXC of 2000 dated 10.04.2000 and demand Notice No. DECDJ/727-29 dated 25.04.2000, are quashed. The writ petition is allowed.”

16. The State of Jammu and Kashmir filed an appeal against the judgment dated 10.12.2002, whereby the writ petition was allowed and the petitioner was discharged from liability of paying the Excise Duty in terms of the impugned orders. The Division Bench of this Court held as under:

“The Learned Single Judge, has faulted the report of the Enquiry Committee on two grounds viz. (1) the witnesses, who have been relied upon by the Enquiry Committee, were not subjected to cross-examination (2) the report of Forensic Science Expert, is an opinion, which could not be taken as conclusive evidence to establish that the Spirit of Tank No. 4 was not lost in the fire.

We are not satisfied with the reasoning given by the learned Single Judge. We find from the enquiry report that the version of the witnesses was specifically put to the writ petitioner for his explanation and the explanation tendered by the writ petitioner, has not been found satisfactory in view of various factors, which include the scientific report of the Forensic Science Expert.

The enquiry, which was being held by the Committee, was not a criminal trial and the learned Single Judge, was not right in commenting upon the value, the expert report warranted before the enquiry Committee. The report of the forensic Science Expert, cannot be brushed aside except for good reasons. We, however, do not find any such reason given by the learned Single Judge. That apart, what we find from the records is that a specific plea was raised by the writ petitioner that the rectified Spirit, in Tank No. 4, had not been

converted into liquor, when it was consumed in the fire. According to the learned counsel, rectified spirit is not liable to Duty and in that view of the matter, asserts the counsel that the demand was illegal. The Writ petitioner has taken a specific plea in paragraph 34(r) of his petition in this respect, which we find, has not been appropriately replied by the State of Jammu and Kashmir.

Plea of the writ petitioner as aforesaid, having remained unanswered leaves no option with us except to set aside the impugned judgment and remand the case to the learned Single Judge for re-hearing the writ petition after providing opportunity to the parties to file fresh pleadings meeting each other's case.

This appeal is, accordingly, allowed and impugned judgment is set aside. OWP No. 312/2000 is remanded to the appropriate roster Bench which will decide the writ petition afresh in accordance with law.

We further notice that after the judgment of learned Single Judge, the writ petitioner has withdrawn the Bank Guarantee, submitted by it before the Writ Court to obtain stay of the recovery of duty levied by the Excise Commissioner.

In the facts and circumstances of the case, we deem it just and proper to direct the writ petitioner to deposit an amount of Rupees Eight Lac (800000) with the Commissioner Excise, Jammu, within one month from today which amount shall be reimbursable in case the writ petitioner succeeds in his writ petition. He shall, at the same time, execute an undertaking that the balance amount of Rs. 6,15,155.50/- and any other amount which becomes due to it, shall be paid to the Excise Commissioner by it, in case the writ petition fails."

17. The petitioner filed a detailed supplementary affidavit and stated that the rectified spirit is not fit for human consumption. For the purpose of human consumption, it is necessary that the strength of the spirit is beyond 60 to 75 degree under law. On the contrary, the rectified spirit has the strength ranging between 143–170 degree (over proof). The petitioner has imported rectified spirit between the years 1990 and 1991, before importing rectified spirit the petitioner was required to complete certain formalities which include payment of Excise Duty on import on rectified spirit. The petitioner, in accordance with the existing procedure and the law applicable and before issuance of the requisite permit required for import of rectified spirit, paid all

duties/fees etc. as was charged, only thereafter import permit was issued in favour of the petitioner.

18. It is stated that rectified spirit which got burnt in the factory premises was duty-paid and the government didn't suffer any loss on that account. The rectified spirit, as such, when it is within the approved premises is not subject to levy of any Excise Duty under the Constitution and law. The duty is payable only on the liquor which is fit for human consumption, since rectified spirit is not fit for human consumption, the State has no power to levy any Excise Duty.
19. Moreover, the rectified spirit consumed in fire had not reached the stage where Excise Duty could have been levied by the respondents. In terms of the judgment passed by Division Bench of this Court dated 13.12.2005, the petitioner deposited an amount of Rs. 8,00,000/- with Commissioner, Excise Department, Jammu, within the stipulated period but also requested them to take a specific stand in respect of the Para 34(r) of his petition. The respondents responded to the supplementary affidavit filed by the petitioner but failed to clarify their stand with respect to Para 34(r). The respondents only reiterated their stand already taken in their counter filed on 11.12.2000.
20. Heard learned counsel for parties and considered the submissions and perused the material on record.
21. Mr. Pranav Kohli, learned senior counsel for the petitioner, has raised a question of law which is twofold;

(1) Whether the State has legislative competence to levy Excise Duty on rectified spirit which admittedly is not fit for human consumption.

(2) Whether Excise Commissioner could have presumed that the rectified spirit had been converted into liquor, fit for human consumption, and levy Excise Duty with the aid of Rule 107 and Rule 108 of the J&K Distillery Rules.

22. In terms of Article 246(1) of Constitution of India, the Parliament has an exclusive power to make laws with respect to any of the matters enumerated in List-I in the Seventh Schedule, i.e., Union List. In terms of Entry 84, the duties of excise and tobacco and other goods manufactured or produced in India except alcoholic liquor for human consumption lies with the Parliament, whereas Entry 51 in the State List, List-II of the Schedule Eight, empowered States to impose Excise Duty on alcohol for human consumption. Entries 84 and 51 of the Seventh Schedule of the Constitution of India being relevant are reproduced as under:

“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 subparagraph (b) of this entry.”

“51. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.”

23. An attempt has been sought to be made by the Respondents to indicate that the Commissioner, taking aid of Rule 107 and Rule 108 of the J&K Distillery Rules, was well within his power to levy Excise Duty on the wasted rectified spirit by converting the same into liquor (IMFL) which is fit for human consumption. Pertinently, J&K Distillery Rules have been framed by the State of Jammu and Kashmir under Section 25 (o)

of the Excise Act. It is absolutely clear from the bare perusal of Section 17 that the Excise Duty can be levied only on (i) quantity produced in the distillery; (ii) passing out of the distillery or (iii) imported or exported from the State. Therefore, the Excise Duty can be imposed only on the finished product. There is no concept of presumptive production in Section 17 of the Excise Act.

24. It is settled position of law that the Rules cannot override the Parent Act and confer new powers to the State which otherwise are not vested with it under the Parent Act. Therefore, once the Parent Act does not provide for, any power to the State to convert rectified spirit on presumption basis into liquor fit for human consumption for levy of Excise Duty, it is beyond the jurisdiction of the Executive to make any such Rule which would confer such power with it.
25. Excise Duty under Jammu and Kashmir Excise Act, SVT, 1958, (hereinafter referred to as the 'Excise Act') can be levied in case of spirits either **exported from or imported into the State**, on the **quantity produced** in the distillery or **passed out of the distillery**. Excise Duty can't be levied under the Excise Act unless spirit is actually produced or passes out of the distillery. As such, the Excise Duty on presumptive production of the spirits cannot be charged under the Act before the process of production is initiated. No power can be derived from Jammu and Kashmir Distillery Rules, 1946, to levy excise duty under Rule 108, same can't be applied under the Excise Act, by application of Section 17 read with section 25(o), in the case of the petitioner.

26. Section 17(1) of the Jammu and Kashmir Excise Act, 1958, being relevant is reproduced as under:

“17(1) How duty may be imposed –

- (1) of manufacturing or supplying by wholesale, or
- (2) of selling by retail, or
- (3) of manufacturing or supplying by wholesale, and selling by retail any country liquor or intoxicating drug in any local area and for any specified period of time;
- (d) by fees on licenses for manufacture or sale,
- (e) by transport duties assessed, in such manner as [the Government] may direct,
- (f) by duty on bottling of liquor.”

27. Section 25(o) of the Jammu and Kashmir Excise Act, 1958, is reproduced as under:

“25. Powers to frame rules - [The Government] may from time to time frame rules-

- (o) generally to carry out the provisions of this Act or of any other law for the time being in force and relating to the Excise revenue.”

28. Rules 107 and 108 of the Jammu and Kashmir Distillery Rules, 1946, being relevant are also reproduced as under:

“107. If it is found that the wastage in any distillery is excessive, the Excise and Taxation Commissioner may prescribe a scale of wastage, and the licensee shall pay duty, as on issue, in respect of all losses attributed to wastage in excess of the scale fixed.

108. In case extraordinary wastage of spirit occurs in a distillery owing to any cause, an enquiry into the circumstances shall be made immediately under the orders of the Deputy Commissioner Excise or the Excise and Taxation Commissioner, and, if it is found that the wastage was due to preventable cause, which the licensee should have foreseen or guarded against, and that the spirit was required to meet a demand made on the distillery, the meeting of which was delayed by reason of the loss, the licensee shall, if directed to do so by the Excise and Taxation Commissioner, pay all or such part, as seems reasonable, of the duty that would have been recovered on the wasted spirit if it had been issued.”

29. In ‘**Synthetics and Chemical Ltd. and others vs. State of U.P. and others**’, 1990 (1) SCC 109, the Apex Court held as under:

“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 respective excise laws enacted by the State the ambit of authority of taxation could not be enlarged by the State Legislature when in List II Item 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 subparagraph (b) of this entry."

96. Entry 51 in List 11 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 subparagraph (b) of this entry."

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.”

30. The Apex Court in “**State of U.P. vs. Modi Distillery & Ors.**”, (1995) 5 SCC 753, held as under:

“9. It is convenient now to note the judgment of a Bench of seven learned Judges of this Court in *Synthetics and Chemicals Ltd. vs. State of U.P.* [(1990) 1 SCC 109]. This Court stated that it had no doubt that the framers of the Constitution, when they used the expression "alcoholic liquors for human consumption", meant, and the expression still means, that liquor which, as it is, is consumable in the sense that it is capable of being taken by human beings as such as a beverage or drink. Alcoholic or intoxicating liquors had to be understood as they were, not what they were capable of or able to become. Entry 51 of List II was the counterpart of Entry 84 of List I. It authorized the State to impose duties of excise on alcoholic liquors for human consumption manufactured or produced in the State. It was clear that all duties of excise save and except the items specifically excepted in Entry 84 of List I were generally within the taxing power of the Central Legislature. The State Legislature had limited power to impose excise duties. That power was circumscribed under Entry 51 of List II. It had to be borne in mind that, by common standards, ethyl alcohol (which 95 per cent strength) was an industrial alcohol and was not fit for human consumption. The ISI specifications had divided ethyl alcohol (as known in the trade) into several kinds of alcohol. Beverages and industrial alcohols were clearly and differently treated. Rectified spirit for industrial purposes was defined as spirit purified by distillation having a strength not less than 95 per cent by volume of ethyl alcohol. Dictionaries and technical books showed that rectified spirit (95 per cent) was an industrial alcohol and not potable as such. It appeared, therefore, that industrial alcohol, which was ethyl alcohol (95 per cent), by itself, was not only non-potable but was highly toxic. The range of potable alcohol varied from country spirit to whisky and the ethyl alcohol content thereof varied between 19 to about 43 per cent, according to the ISI specifications. In other words, ethyl alcohol (95 per cent) was not an alcoholic liquor for human consumption but could be used as a raw material or input, after processing and substantial dilution, in the production of whisky, gin, country liquor, etc. In the light of experience and development, it was necessary to state that "intoxicating liquor" meant only that liquor which was consumable by human being as it was.

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 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.

11. That the measure of excise duty upon alcoholic liquor for human consumption is the alcoholic strength thereof does not make any difference in this behalf, it is only the alcoholic strength of the final product which is relevant.”

31. Learned counsel for the petitioner has also relied upon the judgment passed by this court in OWP No. 492 of 2000, titled ‘**M/s Dogra Distilleries Vs. State of J&K and others**’, wherein it was observed and held as under:

“10. This Section prescribes only three modes of imposing Excise Duty on Spirits or beer i.e. (1) on the quantity of spirit and beer which is produced in the distillery or brewery or (2) which passes out of the distillery/brewery/warehouse, or (3) which is imported into or exported from the State. This sub-section, on its plain reading, therefore, contemplates imposition of duty on the actual production of spirits in the Distillery or Brewery or actual storage of Spirits or beer in Warehouse or its exit from the Distillery/Brewery or warehouse, or on the actual quantity of Spirits or beer imported into or exported from the State. This section, therefore, does not even remotely suggest imposition of duty on presumptive production of spirits or beer in the factory or stored in the warehouse or taken out there from. There is no provision specific or otherwise in the Excise Act which may empower imposition of duty on presumptive quantity of spirits from molasses or any other raw material, which the license may get into his factory for production of spirits or beer.

11. The duty imposed by the respondents on the petitioner, on presumptive quantity of spirit cannot, therefore, be traced to, or justified, as duty, under any provision of the Excise Act.

12. The respondents justify their demand on the petitioner on the basis of imposition of Excise duty on the presumptive quantity of Spirits, which the petitioner should have got out of the raw material received in its factory. This, they want to do with the aid of Rule 38 of the Distillery Rules, which have

been framed by the government in exercise of powers, which Section 25 vests in it.

13. In order to examine the contention of learned Advocate General, that Rule 38 of the Distillery Rules, framed in terms of power vested in the government under Section 25 of the Excise Act read with Section 17, authorizes the government to levy Excise duty on the presumptive quantity of liquor, regard needs to be had to the provisions of Section 25 of the Act as to whether or not this provision delegates any such authority in the government to frame rules, facilitating imposition of Excise duty in one or the other way, or more particularly in any way prescribing mode and method in addition to one prescribed by the Legislature under Section 17 of the Act.

14. Plain language employed in Section 25(a) to (n) does not indicate vesting of any power by the Legislature in the government to frame rules for imposition of duty much less the duty in the manner other than the one prescribed under Section 17 of the Act. The only other sub-section which, therefore, remains to be considered is sub-section 25(o) of the Act, on which reliance was placed by learned Advocate General and, according to him, any rule framed by the government for the purpose of ensuring due payment of Excise revenue would be justified under Rule 25(o) of the Act.

15. Section 25(o) of the Excise Act is not intended to be an omnimax provision embracing all residuary powers in the government to frame rules for any purpose whatsoever. It, on the other hand, going by its plain language, restricts government's power to frame such rules as may be necessary to carry out the provisions of the Act or of any other law for the time being in force but relating only to the Excise revenue. This is so because the word "and" employed by the Legislature in its wisdom in Section 25(o) does not admit of its being read as "disjunctive". Presence of word "and" in Section 25(o), on the other hand, suggests Legislature's emphasis on vesting such power in the State government to frame rules, pertaining only to the Excise revenue and to no other purpose.

16. The next question which would fall for consideration is as to whether the expression, 'Excise revenue' appearing in Section 25(o) would include in it imposition of Excise duty as well. To find answer to this question reference needs to be made to the definition of expression "Excise revenue" as it appears in Section 3(1) of the Act, which reads thus:-

"Revenue derived or derivable from any duty, fee, tax, fine or confiscation imposed or ordered under the provisions of this Act or of any other law for the time being in force relating to liquor or intoxicating drugs".

17. A plain reading of the definition of the expression 'Excise revenue' indicates about the revenue which gets generated from any duty, fee, tax, fine or confiscation imposed or ordered under the provisions of the Excise Act or under any other law for the time being in force relating to liquor or intoxicating drugs. In other words, Excise revenue would come in existence only after any duty, fee, tax, fine or confiscation was sanctioned under the provisions of the Excise Act or any other law for the time being in force relating to liquor or intoxicating drugs. In other words, imposition of duty, fee, tax or fine etc. is a stage prior to the coming into being of Excise revenue.

18. Rule making power of the government in terms of Section 25(o) of the Excise Act is referable only to the method, manner and mode of recovery etc. pertaining to Excise revenue and not to the mode and manner of imposition of any duty, fee, tax, fine or confiscation, which, as already pointed out, is a stage prior to coming into being of the Excise revenue.

19. Section 25(o) of the Excise Act, in my opinion, therefore, does not vest any authority in the government, by way of delegated legislation, to frame rules prescribing method and manner of levying duty on presumptive production of spirits from raw material.

20. Rule 38 of the Jammu and Kashmir Distillery Rules now needs to be examined. This rule reads thus:-

"38. The licensee shall, if there is a demand upon his distillery for such a quantity, produce during each calendar year at least 90 per cent, of the outturn of plain and spiced country spirit which his stills are capable of producing according to the estimate of their charge capacity entered in his license. The calculation of the outturn shall be based on the assumption that 100 gallons of wash, whether of gur, molasses or mahua will yield 12 proof gallons of spirit, that each continuous still will work on an average 12 hours a day, and that each pot-still will be charged with

wash one and a half times a day and that all stills will work for an average of five days a week throughout the year."

21. Perusal of this Rule indicates about the formulae which may be employed to presume about the quantity which the manufacturer of spirit would generate from the raw material it had received in its factory. In other words, it is this rule which permits presumptive determination of the quantity of spirits out of the raw material received by a licensee in its factory. This rule had been urged to owe its existence to Section 25(o) of the Excise Act, which, as held earlier, does not delegate any such power in the government to frame rules, prescribing mode and manner of levying duty on presumptive production of spirits from the raw material.

22. This rule, therefore, cannot be used by the respondents to treat the presumptive quantity of spirit, determined in terms of this rule, as actual production of spirit by a licensee for levying duty under Chapter-V of the Excise Act.

23. The question as to whether Excise duty is levyable on "presumptive quantity" of liquor came up for consideration before Hon'ble Supreme Court of India in case titled State of U.P vs. Modi Distillery, reported as (1995) 5 SCC, 753, where their lordships held as under:-

"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."

24. This view was reiterated in Gupta Modern Breweries vs. State of J&K, reported as (2007) 6 SCC 317. The view gets support from yet another case, Supreme Steels & General Mills V. Union of India, reported as 1997(96) E.L.T. 232 (Del).

25. Action taken by the respondents in imposing and recovering duty on the presumptive quantity of spirits on the basis of audit check, with the aid of Rule 38 of the Distillery Rules and contrary to the provisions of Section 17 of the Excise Act, cannot thus be justified. Rule 38 of the Distillery Rules may be Rules may be used

by the respondents for any purpose other than the one for determining the quantity of spirits and beer for imposition of Excise duty under Section 17 of the Excise Act. This rule, therefore, is required to be read down to the above extent.

26. Reading down Rule 38 of the Jammu and Kashmir Distillery Rules, demand notice No. DECDJ/9679-81 dated 29.3.2000 is, accordingly, held to be in violation of Section 17 of the Excise Act.

27. This petition is allowed and demand notice No. DECDJ/9679-81 dated 29.3.2000, issued by Deputy Excise Commissioner (Distilleries) Jammu, placing a demand of Rs. 12,07,500.00 on the petitioner, accordingly quashed.”

32. The respondents challenged the judgment passed by the learned Single bench in ‘Dogra Distilleries’ (*supra*), by way of appeal bearing LPAOW No. 27/2008, which was dismissed by holding as under:

“8. From the plain reading of section 17 of the Act as well as Rule 38 of the Rules prior its amendment, it is evident that Rule 38 is a mode prescribed by the Act for levying the excise duty. Admittedly, in the instant case, demand notice is raised on the basis of Rule 38 as it existed prior to its amendment in the year, 2006. The Supreme Court in the case of *Muhammadbhai Khudabux Chippa and anr. vs. State of Gujarat* and another AIR 1962 1517 while dealing with the issue of Produce Bombay Agriculture constitutionality Market Act inter alia has held that no tax fee or other pecuniary imposition can be levied by the subordinate legislation unless statute specifically authorize its imposition. General authorization for carrying out the purposes of the Act does not include taxation. Similar view was taken by the Supreme Court in the Case of *B.C. Banerjee vs. State of M. P.* AIR 1971 516 SC. The Supreme Court has reiterated 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 un-authorizes the imposition even if it is assumed that the power to tax can be delegated to the executive. It is further held that a rule making authority has no plenary power and it has to act within the limits of the power granted to it. In *Deepak Theatre Dhuri vs. State of Punjab* and other 1992 Supp (1) SCC, also similar view was taken by

the Supreme Court. The aforesaid view was further reiterated in the case of Corporation Ban vs. Saraswati and anr. (2009) 1 SCC 540.

9. In view of the aforesaid enunciation of law, it is evident that power to levy tax or duty cannot be exercised under subordinate legislation i.e. under the Rules. Admittedly, parent act, the J&K Excise Act does provide levy on duty in the manner, which is indicated under Rule 38, which existed prior to its amendment. The aforesaid levy is, therefore, clearly impermissible under law and the learned Single Judge has rightly quashed the demand raised on the basis of aforesaid Rule. In view of the fact that the Rule 38 of the Rules is no longer in existence and has been substituted by SRO 236 dated 20.07.2006, it is not necessary for us to give any opinion with regard to validity of the aforesaid Rule.

10. Needless to say that amount deposited by the respondent pursuant to the demand notice be refunded to it along with interest as provided under Section 24(b) of the Excise Act.”

33. The judgment passed by the Division Bench has been upheld by the Supreme Court of India in Special Leave Petition No. 6355/2018, while dismissing the Special Leave Petition filed by the respondents.
34. The counsel for the petitioner submits that the judgment passed by the Division Bench of this Court dated 27.07.2017 in '*M/S Dogra, Distilleries Vs. State of J&K and others*' is squarely applicable to the instant petition. The legislature has only the competence to levy Excise Duty on manufacture of liquor which is fit for human consumption which would mean that the State has no legislative competence to levy duty on the rectified spirit that too on the basis of presumption.
35. In the judgment passed by the Division Bench of this Court, the specific direction was given to the respondents to clarify their stand with regard to Para 34(r) of the writ petition filed by the petitioner,

but the respondents didn't improve upon the stand already taken in the counter affidavit filed way back in the year 2000. Paragraph no. 34(r), for facility of reference, is reproduced herein, thus:

"34(r) That the power to Levy Excise Duty vest with the Commissioner in terms of section 16 & 17 of J&K Excise Act. The duty is leviable on the manufacture or import of IMFL. Unless it is established that the spirit said to be destroyed was in fact used for manufacture of liquor fit for human consumption, no duty can be imposed and recovered. Admittedly there is no material on record to establish that the spirit was converted into liquor. The spirit being only a raw material, no excise duty can be levied or recovered on the raw material under the provisions of J&K Excise Act. The impugned order dated 10th of April,2000 and consequential demand notice dated 25th of April,2000 are all illegal, without authority of law, arbitrary, mala fide void-ab-initio and non est in the eyes of law and are thus violative of article 265 of Constitution of India. The Respondents are not entitled to impose charge and collect excise duty on the spirit which was destroyed in the fire incident on 18-11-1991. Rule 107 where under such duty is being levied and recovered is unconstitutional, ultra vires and beyond the rule making power of the respondents the same is also liable to be struck down."

Reply of respondents to Para 34(r) of the writ petition:

"That in reply to Para (r) it is submitted that the duty is leviable on the manufacturer or import of the liquor and the duty, is also leviable in case where a particular distillery shows last year's production of the liquor out of the total contents of the spirit which is at about 165 degree in case there is any deficit

in such production that deficit is also, subjected to duty by the Excise Department. In the present case the petitioner has shown 36,000 liters of spirit at 165° without properly accounting for the same. Hence while assessing the Commissioner has converted the same into liquor fit for human consumption and the duty was charged upon the same, under rules. Thus the recovery notice or the order impugned neither excessive nor had in law but is legal, constitutional and intra virus and liable to be upheld.”

36. It is specifically stated in Para 34(r) of the writ petition that in terms of section 16 and 17 of the Excise Act, power to levy the Excise Duty vests with the Commissioner. The duty is leviable on the manufacture or import of IMFL. It is established that the destroyed spirit, was not fit for human consumption, therefore, no duty could have been imposed and recovered on such spirit. The respondents have failed to defend their action of imposing Excise Duty on rectified spirit not only in their counter affidavit and reply to the supplementary affidavit but during arguments also as the learned counsel for the respondents admitted while making submissions that on rectified spirit, in terms of Entry 84 of Union List, no Excise Duty could have been levied by the State Government.

37. The Apex Court in **‘Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others’, 1978 (1) SCC 405**, has held as under:

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the

time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Gordhandas Bhanji (1)* "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

38. In '**State Of Orissa vs. M/s Utkal Distilleries Ltd.**', the Hon'ble Apex Court has held as under:

"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."

39. Admittedly, there is no material on record to establish that the spirit in question was converted into liquor (IMFL) fit for human consumption.

40. Learned counsel for the petitioner rightly submits that the constitutional scheme as enshrined in seventh schedule, particularly

Entry 84 of Union List and Entry 51 of the State List clearly provides that it is only the Parliament which has the legislative competence to levy Excise Duty so far as alcoholic liquor unfit for human consumption is concerned and the State legislature is well within its power to levy Excise Duty with respect to alcoholic liquor fit for human consumption. In the present case, by virtue of impugned demand order, the Excise Commissioner has levied Excise Duty on rectified spirit which admittedly is unfit for human consumption. Therefore, in view of the constitutional scheme as explained above, the impugned order levying Excise Duty on rectified spirit which is unfit for human consumption is bad in law.

41. As per the ratio laid down in the judgment titled *Modi Distilleries (supra)*, the rectified spirit for industrial purposes, as per definition, is a spirit, defined as a spirit purified by distillation having a strength not less than 95% by volume of ethyl alcohol. Industrial alcohol, which is ethyl alcohol, is not only non-potable but is highly toxic, therefore, it is not a liquor for human consumption but can be used as a raw material or input, after processing and substantial dilution in the production of liquor (IMFL).
42. Section 17 of the Excise Act clearly specifies that Excise Duty can be levied only on:
- (i) Quantity produced.
 - (ii) Passing out of the distillery.
 - (iii) Imported or exported from the State.
43. There is no concept of presumptive production under Section 17 of the Excise Act. Section 25(o) of the Excise Act is referable only to the method, manner and mode of recovery pertaining to Excise

revenue and not to the mode and manner of imposition of Excise Duty and that too on presumptive production of spirit from raw material.

44. Rule 108 of the J&K Distillery Rules, 1946, indicates that in case of extraordinary wastage of spirit, under the orders of the Deputy Excise Commissioner or Taxation Commissioner, an inquiry can be held into such wastage and if it is found that such wastage could have been avoided, Excise Duty can be levied on presumptive basis, i.e., on the presumption that if the wasted rectified spirit had been put to use and converted into finished product, the Government would have levied the Excise Duty.
45. Thus it becomes quite axiomatic that the power which is not provided in the Parent Act could not be made use of by the State by usurping the power of the Parliament. Therefore, when the Parent Act does not provide for any power to the then State to levy Excise Duty on the rectified spirit converted into liquor fit for human consumption, it is beyond the jurisdiction of the State Legislation to make any such Rule. In this view of the matter, the impugned orders passed by the respondents under Rule 108 of the J&K Distillery Rules, 1946, are held to be in clear contravention of the Excise Act, as well as judgments passed by the Apex Court and this Court in *Dogra Distilleries (supra)*, to the extent instant petition is concerned.
46. Learned counsel for the respondents has relied upon the judgment passed by the Karnataka High Court in '**State of Karnataka and others vs. Thirumala Distilleries**', 2004 Legal Eage (KAR) 634.

47. The action taken by the respondents in imposing and recovering the Excise Duty on presumptive production of liquor by converting rectified spirit into liquor fit for human consumption requires to be read down to the extent that these rules cannot be pressed into service for assessing the wastage of spirit in a distillery with respect to the rectified spirit not fit for human consumption for imposing Excise Duty under Section 17 of the Excise Act.

48. In '**Indian Social Action Forum (INSAF) vs. Union of India**', the Apex Court held that:

"20. Where the provisions of a statute are vague and ambiguous and it is possible to gather the intention of the legislature from the object of the statute, the context in which the provisions occur and purpose for which it is made, the doctrine of "reading down" can be applied. To save Rule 3(v) from being declared as unconstitutional, the Court can apply the doctrine of "reading down."

49. In the above background, the Demand Notices dated 10.04.2000 and 25.04.2000 are held to be in violation of Section 17 of the Excise Act. Rule 107 and 108 of the J&K Distillery Rules, 1946, insofar as it levies Excise Duty on rectified spirit which is not fit for human consumption is also held to be *ultra vires* to the Excise Act, 1958.

50. In view of the aforesaid facts and circumstances of the case, this petition is allowed. The Rules 107 and 108 of the J&K Distillery Rules, 1946, are as such, read down to the extent of the case in hand. It does not require any reiteration that the said Rules viz. 107 and 108 of the J&K Distillery Rules, 1946, shall continue to be made use of as long as such application does not conflict with the Constitutional Scheme or with the provisions of the Parent Act i.e. the Excise Act. The impugned order and Demand Notice dated

10.04.2000 and 25.04.2000 respectively are accordingly quashed. The amount of Rs. 8,00,000/- (eight lac rupees) deposited by the petitioner in compliance to the judgment of the Division Bench of this Court rendered in LPAOW No. 74/2003, titled '*State of J&K and others vs. M/s Gupta Modern Breweries*' shall be refunded/reimbursed to the petitioner along with interest as provided under Section 24-B of the Excise Act.

51. **Disposed of** accordingly.

(MOKSHA KHAJURIA KAZMI)
Judge

Jammu:
24.08.2023
Michal Sharma



Yes/No
Yes/No