

HIGH COURT OF CHHATTISGARH AT BILASPUR

CORAM: HON'BLE SHRI YATINDRA SINGH, C.J.
HON'BLE SHRI PRITINKER DIWAKER, J.

Writ Appeal No. 116 of 2007

Appellant : Kedia Castle Dellon Industries Limited,
Kolkata

VERSUS

Respondents : The State of Chhattisgarh and others

Appeal under Clause X of the letters patent

Appearance: Shri AM Mathur, Senior Advocate with Shri Abhishek Sinha, Shri Ghanshyam Patel and Shri Abhinav D Dhannodkar, counsel for the Appellant.
Shri Kishore Bhaduri, Additional Advocate General for the State/ Respondents.

JUDGEMENT

(15th July, 2013)

1. The main question involved in this case is:

'Whether the circular dated 23.05.2001 (the Circular) issued by the Excise Commissioner, Chhattisgarh (the Commissioner) directing affixing of holograms on the liquor bottles and charging of ₹1,120/- per ten thousand holograms is supported by any statutory provision or not.'

It arises in this writ appeal against the order of the single judge dated 19.07.2004 dismissing the Writ Petition-2503 of 2003 filed by M/s Kedia Castle Dellon Industries Limited (the Appellant) for setting aside the Circular on the ground of alternative remedy of filing suit.

THE FACTS

2. The Excise Commissioner, MP published a notice inviting tenders (the 2000-Tender) on 07.03.2000 for bottling and supplying of country made liquor in sealed bottles to retail sellers for the erstwhile State of Madhya Pradesh.

3. The Appellant as well as some others were the applicants in the 2000-Tender. The following three tenderers were successful to supply country made liquor for the areas mentioned below:

- (i) The Appellant for Raipur and Durg;
- (ii) Well Come Distillery Ltd. for Bilaspur, Raigarh and Korba;
- (iii) SOM Distillery Ltd. for Rajnandgaon and Bastar.

4. The State of Chhattisgarh was created on 01.11.2000. The aforesaid areas fell within the state of Chhattisgarh. The Commissioner issued the Circular requiring affixation of a hologram on the liquor bottles.

5. The Circular was applicable to the five districts namely, Raipur, Rajnandgaon, Durg, Dhamtari and Mahasamund only. The area of operation of the aforesaid three persons fell within the districts, where holograms were to be affixed.

6. The holograms were to be issued by the State Excise Department (the Department) at the cost of ₹1,120/- per ten thousand or 11.2 paise per hologram.

7. The Appellant complied with the same and the period of the 2000-Tender came to an end on 31.03.2002 without any dispute being raised by the Appellant or any other successful tenderer.

8. A fresh notice inviting tenders for the period 01.04.2002 to 31.03.2004 (the 2002-Tender) was published on 05.03.2002. The same three were again successful for the country made liquor at the following places.

- (i) The Appellant for Raipur, Korba and Durg;
- (ii) Well Come Distillery for Raigarh; and
- (iii) SOM Distillery for Rajnandgaon, Bastar and Bilaspur.

These areas fell within the districts, where holograms were to be affixed.

9. During the 2002-Tender, the Appellant initially complied with the Circular but after expiry of six months, filed the representations on 20.11.2002 and 24.01.2003 before the Commissioner mentioning that the purchase of the holograms was a financial loss to the Appellant. It was prayed that the representations be considered sympathetically and

appropriate direction be issued in regard to purchase and affixing of holograms.

10. The Appellant also gave a legal notice on 03.03.2003. Thereafter, a Writ Petition-909 of 2003 was filed challenging the Circular. In the said writ petition, prayer for interim relief was rejected by the single judge on 07.04.2003.

11. Against the aforesaid order, the Appellant filed LPA-15 of 2003. This LPA and the writ petition were disposed of on 17.07.2003 granting liberty to the Appellant to file a representation before the State Government.

12. The Appellant filed its representation however, the State Government rejected it on 01.08.2003.

13. The Appellant filed Writ Petition-2503 of 2003 challenging the Circular as well as the order dated 01.08.2003 rejecting the representation. It was dismissed on 19.07.2004 on the ground of alternative remedy of filing a civil suit.

14. Against the aforesaid order, the Appellant filed LPA- 49 of 2004. It was dismissed as not maintainable on 29.04.2005. Against this order, The Appellant filed SLP number 19948-19949 of 2005 before the Supreme Court.

15. During pendency of the SLP, the Chhattisgarh High Court (Appeal to Division Bench) Act, 2006 (the 2006 Act) came into force providing appeal against the orders of the single judge in a writ petition under article 226 of the Constitution. In view of the 2006-Act, the SLP was allowed on 10.05.2007 and the case has been sent back to this Court for decision on merits in accordance with law.

16. After remand from the Supreme Court, the writ appeal of the Appellant was numbered as Writ Appeal - 116 of 2007. It has come up for final hearing before us.

17. It is relevant to point out that no dispute regarding price of holograms was raised by the other two successful tenderer namely SOM Distillery and Well-Come Distillery for any period.

POINTS FOR DETERMINATION

18. We have heard counsel¹ for the parties. The following points arise for determination in the case:

- (i) Whether the writ petition should be dismissed on the ground of alternative remedy;
- (ii) What is the nature of the Circular;
- (iii) Whether the Circular is supported by any statutory provision;
- (iv) Whether the Appellant is entitled to revision of rates because of the financial burden due to affixing of hologram;
- (v) Whether the Circular is valid;
- (vi) In case, the answer to the third point is in negative, then what relief may be granted to the Appellant.

1st POINT: NO DISMISSAL FOR ALTERNATIVE REMEDY

19. It is admitted between the parties that decision on merits on the claim made by the Appellant depends upon the validity of the Circular. If the Circular is valid, then no relief can be granted to the Appellant. But if the Circular is invalid then some relief has to be granted to the Appellant. The question whether the Circular is valid or not is a question of law and not a question of fact.

20. The State had already realised the amount at the rate of ₹1,120/- per ten thousand holograms. The number of holograms issued are also fixed and can be ascertained by the State. The amount paid on the holograms

¹We are thankful to the counsel for the parties for looking into part of the judgement under the heading 'THE FACTS', 'POINTS FOR DETERMINATION', '1st POINT: NO DISMISSAL FOR ALTERNATIVE REMEDY' and 'APPENDIX'. Even then, if there are any mistakes, then they are ours.

is also fixed. There is no dispute on this amount. The dispute between the parties is about the validity of the Circular. And depending on its validity, the Appellant may get back the amount paid on the holograms.

21. In view of the above, there was no justification to dismiss the writ petition on the ground of alternative remedy and we proceed to decide the case on merits.

2nd POINT: REGULATORY IN NATURE

22. Entry 51 list 2 of schedule VII of the Constitution relates to duty of excise and countervailing duties on alcoholic liquors for human consumption as well as opium, Indian hemp, and other narcotic drugs and narcotics.

23. The aforesaid entry does not include the medicinal and toilet preparations containing alcohol, opium, Indian hemp, and other narcotic drugs and narcotics. Nevertheless, the entry confers regulatory powers on the State Government for the items mentioned in it. This was so explained in *State of UP vs Saraya Industries* {(2006) 11 SCC 129} (the Saraya case): the case strongly relied by the counsel for the Appellant.

24. The Saraya case related to the holograms, but the controversy involved in that case was entirely different from the controversy involved in the present case.

25. In the Saraya case, the circulars were issued requiring holograms to be affixed on the liquor bottle and the Excise Inspector was required to maintain the stock of the holograms issued. The following provision was made in respect of wasted holograms:

- The wasted holograms were required to be produced for verification before a committee;
- If they were not produced then a presumption was to be drawn that they were misused; and

- The distiller was liable to deposit the excise duty on the quantity of liquor covered by those wasted holograms.

26. In the Saraya Case, some wasted holograms could not be produced before the committee. Thus, in terms of the circulars, penalty equivalent to excise duty on the quantity of liquor covered by these wasted holograms was imposed. This imposition along with the circulars were challenged.

27. The Supreme Court upheld the challenge. The court observed that: 'A provision which confers powers upon a statutory authority in terms whereof a penalty is to be imposed, damages are to be paid for non-payment of excise duty, which in our opinion, must be done through a valid subordinate legislation and not by way of issuance of a circular letter.'

28. Nonetheless, the court also observed, 'The legislative field in regard to levy of excise duty is covered by Entry 51, List II of the Seventh Schedule of the Constitution of India. It may be true that the resort to regulatory measures can be taken by the State, but the same must be done in the manner laid down under the Act.'

29. In the present case, neither penalty nor damages equivalent to the excise duty on the liquor covered by the wasted holograms is being recovered nor challenged. The respondents are charging the price of the hologram at the rate of 11.2 paise per hologram that is supplied to the Appellant. This aspect was not challenged in the Saraya Case.

30. The decision to affix holograms and charging price of 11.2 paise per hologram was taken by the State to stop smuggling of liquor and evasion of excise duty. Though, it was circulated by the Commissioner. This is

clear from reading of the Circular (see below for relevant part of the circular)².

31. In our opinion, the Circular is merely a regulatory measure. However, it is still to be seen:

- Whether such a direction could be issued under the law or not; and
- Whether due to financial burden of affixing holograms at the rate of 11.2 paise per hologram, the Appellant could claim revision of rates or damages by way of return of the price paid.

This will be discussed, while considering the 3rd and 4th point.

3rd POINT: THERE IS A STATUTORY PROVISION

32. The counsel for the Appellant relied upon the following cases:

- (i) The Saraya Case;
- (ii) M/s Gupta Modern Breweries vs State of Jammu & Kashmir {2007 (5) SCALE 842} (the Modern-Breweries case);
- (iii) Nagrik Upbhokta Manch vs Union of India & Others {(2002) 5 SCC 466} (the Nagrik-Upbhokta case);
- (iv) Indian Bank Association vs M/s Devkala Consultancy Service {JT 2004 (4) SC 587} (the Indian-Bank case);

²*The relevant part of the Circular dated 23.05.2001 is as follows:*

राज्य शासन द्वारा यह निर्णय लिया गया है कि रायपुर संभाग के ०५ जिलों में यथा – रायपुर, दुर्ग, राजनांदगाँव, धमतरी, महासमुन्द में देशी/ विदेशी मदिरा दुकानों का व्यवस्थापन निश्चित लायसेंस फीस/ ड्यूटी आधारित प्रणाली के तहत किया जाये। इसका विस्तृत विवरण एवं नियमों की प्रति आपको उपलब्ध करा दी गई है।

२. इस प्रणाली के अंतर्गत अवैध मदिरा के प्रचलन पर रोक लगाने व आबकारी राजस्व सुरक्षा की दृष्टि से शासन द्वारा निर्णय लिया गया है कि उपर्युक्त ०५ जिलों में फुटकर दुकानों पर विक्रय होने वाली देशी एवं विदेशी मदिरा, बीयर के प्रत्येक पात्र के ऊपर आबकारी विभाग का होलोग्राम लगाया जायेगा। ये होलोग्राम देशी मदिरा की स्थिति में मद्य भण्डागार स्तर पर एवं विदेशी मदिरा/बीयर की स्थिति में थोक लायसेंसी के स्तर पर (एफ० एल० १०) लगाये लायेंगे। ये होलोग्राम इस बात का प्रमाण होगा कि मदिरा वैध स्रोत से प्राप्त की गई है और उस पर आबकारी ड्यूटी का भुगतान कर दिया गया है।

(v) Commissioner of Central Excise vs Chhata Sugar Company Limited {(2004) 3 SCC 466} (the Chhata case)

And submitted that:

- The Appellant could not sell country liquor unless the bottles had holograms affixed upon them. It is a compulsory exaction of money and amounts to tax;
- Article 265 of the Constitution prohibits any taxation without there being any law. No tax or fee can be imposed without being supported by any statutory provision. There is no statutory provision for issuing the Circular. It is violative of article 265 of the Constitution.

Cases Cited by the Appellant's Counsel

33. At this stage, it would be relevant to consider the cases relied upon by the Appellant.

The Saraya Case

34. This case has been considered, while discussing the previous point. Suffice to say that imposition of penalty by circulars was struck down as there was no statutory support for the same.

The Chhata Case

35. The Chhata case was under the Central Excise Act (the Central-Act). Under the UP Sheera Niyam Adhiniyam, 1964 (the UP-Act) administrative charges of ₹10/- per quintal were levied by the State Government. The question was whether it could be included in the assessable value of molasses under the Central-Act or not.

36. The Supreme Court held that:

- The cost of administrative charges did not fall within the normal price;
- There was no question of deducting the same; and
- It can not form a part of the normal price.

However, the court also looked the problem from another point of view and observed that:

- Under the UP-Act, the administrative charges amounted to tax; and
- It could not be included in the assessable value under section 4(4)(d)(ii) of the Central Act.

Other Cases

37. In the Modern-Breweries, and the Nagrik-Upbhokta cases, the court held that tax or fee cannot be levied without authority of law. In the Indian-bank case, the court held that a tax cannot be imposed without there being any authority of law. In these cases, the tax/ fee was stuck down as it was not supported by statutory provision, it was stuck down.

38. There is no dispute with the proposition that the tax cannot be levied without authority of law. But the question is, is there any authority of law for issuing the Circular requiring affixing of holograms and charging 11.2 paise per hologram or not ?

Statutory Provision

39. Section 62 of the Act is titled '**Power to make rules**'. Sub-section (1) of section 62 {62(1)} of the Act empowers the State Government to make rules for carrying out the provisions of the Act. Sub-section (2) of section 62 {62(2)} of the Act empowers the State Government to make rules on specific aspects/ purposes without prejudice to the generality of section 62(1).

40. Clause (d) of section 62(2) {62(2)(d)} of the Act empowers the State Government to frame rules regulating the import, export, transport, manufacture, collection, possession, supply or storage.

41. Clause (h) of section 62(2) {62(2)(h)} of the Act empowers the State Government to frame rules prescribing authority, the form, terms and condition and subject to which any licence, permit or pass shall be

granted. It further provides some specific matters in sub-clause (i) to (v) of section 62(2)(h) {62(2)(h) (i to v)}.

42. The State Government has framed the Chhattisgarh Country Spirit Rules, 1995 (the Rules) in pursuance of the power conferred under section 62(1) read with section 62(2)(d) and 62(2)(h) of the Act.

43. Rule 4 of the Rules is titled '**Manufacture and Bottling**'. Sub-rule (12) of rule 4 {4(12)} (see Appendix-1) provides that cleaning, filling, corking, sealing, labelling, stocking and issuing of bottles shall be done to the satisfaction of the Commissioner by the licensee under the supervision and direction of the officer-in-charge of the warehouse in the manner prescribed therein and in such other manner as the Commissioner may direct from time to time.

44. In case sealing or labelling is not done in accordance with directions of the Commissioner then under sub-rule 13 of rule 4 {rule 4(13)} (see Appendix-1), of the Rules, sealing charges as prescribed by the Commissioner, can be deducted and the decision of the Commissioner is final.

45. Clause 17 of the both tenders (see below)³ provides that submission of tender form implies that the tenderer has read and understood the Act and the Rules made thereunder as well as the terms and conditions of the tender form. The Appellant cannot say that he had no knowledge of the Rules.

46. Holograms are affixed on the top of the cap of the liquor bottle and are broken on opening of the cap. This was done in pursuance of the

³Clause 17 of the NIT is as follows:

17. Submission of tender by a tenderer shall imply that he has read and understood the provision of the Madhya Pradesh Excise Act rules made thereunder and in particular the detailed terms and conditions of the tender and the contents of the form of tender which shall be legal binding on the tenderer.'

decision taken by the State Government to stop smuggling and evasion of excise duty (see discussion on the previous point).

47. The entire process of affixing holograms is nothing but a kind of sealing of the cap of the bottle by a kind of label *ie* hologram.

48. The affixation of holograms is merely a regulatory measure. This decision was taken by the State Government and direction in the form of the Circular was issued by the Commissioner to stop smuggling and evasion of excise duty under rule 4(12) of the Rules framed under the power conferred on the State Government under section 62 of the Act. It is supported by a statutory provision.

49. In the cases cited by the Appellant, the Supreme Court struck down the tax or fee as there was no statutory provision but it is not so in the present case; there is a statutory provision.

4th POINT: DAMAGES, RETURN OF PRICE—CANNOT BE CLAIMED

50. The direction to affix hologram at the rate of ₹1,120/- per ten thousand or 11.2 paise per hologram is undoubtedly a financial burden on the Appellant. This was done during continuance of the 2000-Tender. The question is, whether the Appellant is entitled to ask for the revision of rates due to this financial burden.

51. In this regard, paragraphs 8 (b) of the conditions of the tender notice (see below)⁴ is relevant. It provides that:

- The successful tenderer will have to supply plain and spiced spirit on the rate/ rates accepted/ sanctioned by the Government; and

⁴ The relevant paragraph 8b of the NIT is as follows:

'8. ...

(b) The successful tenderer will have to supply plain and spiced spirit on the rate/rates accepted/sanctioned by the Government and shall have no right to ask for revision of rates due to change in any levy, export, import fee or any other taxation in any exporting or importing state during the currency of the contract period.

...'

- The successful tenderer shall have no right to ask for revision of rates due to change in any levy, export, import fee or any other taxation in any exporting or importing state during the currency of the contract period.

52. The case of the State Government is that the financial burden of 11.2 paise per hologram is the value of the hologram to be affixed on the bottle. However, it is the case of the Appellant that financial burden of 11.2 paise per hologram is a levy/ tax. Even if it is to be levy, the revision of rate cannot be asked. This can be seen from another angle.

53. It is relevant to point out that the Circular was issued by the Commissioner on 23.05.2001 during continuance of the 2000-Tender. After issuance of the Circular, ten months period was still left. The Appellant continued during this period without raising any objection; it never claimed relief on this account: it was only after completion of this 2000-Tender and expiry of six months of the 2002-Tender that the Appellant started objecting to the price of the holograms.

54. It is relevant to point out that initially hologram contained national emblem. One Shri Rama Kant Mishra filed public interest litigation, namely Writ Petition- 1246 of 2001 restraining the respondents from misusing the national emblem. In this writ petition initially interim order was granted restraining the use of national emblem but it was disposed of when the use of national emblem was stopped; there was no challenge to the price of the hologram. However, the present petitioner never objected to the price of the hologram on any other ground during continuance of the 2000-Tender.

55. The second notice inviting tender was published on 05.03.2002. At that time, the circular was in existence. The Appellant knew very-well that it was to affix holograms on every bottle, which it was already doing from last ten months in the 2000-Tender. The Appellant undoubtedly gave its offer the second time after considering this aspect.

56. After being successful in the 2002-Tender for the period 01.04.2002 to 31.03.2004, the Appellant initially did not object to the same. He objected it for the first time after expiry of six months on 20.11.2002. Both times, there were two other successful tenderers. It is relevant to point out that the other successful tenderers never claimed any relief on account of charging 11.2 paise per hologram.

57. The Circular has statutory support as held in the preceding point. In the 2000-Tender, the Appellant never objected. In the 2002-Tender the offer was after considering price of the hologram. It has already realised it in the price of the liquor. The Appellant is estopped from claiming damages by way of refund of the price of hologram.

58. The counsel for the Appellant relied upon some decisions (see below)⁵ and submitted that:

- There cannot be estoppel and acquiescence against constitutional and statutory provisions;
- The claim of the Petitioner cannot be denied on this ground.

59. It is not necessary to consider the aforesaid submission or the cases cited by the counsel for the Appellant as we have already held that the Circular is supported by a statutory provision and has statutory force.

5th & 6th POINT: CIRCULAR IS VALID

60. In view of our decision on point number three and four, not only the Circular is valid and is supported by statutory provision, but the Appellant

⁵The cases relied upon by the Appellant were as follow:

- Hasham Abbas Sayyad vs Usman Abbas Sayyad {(2007) 2 SCC 355};
- Fida Hussain vs Moradabad Development Authority (AIR 2011 SC 3001);
- Automotive Tyre Manufacturers vs Designated Authority {(2011) 2 SCC 258};
- State of Tripura vs K.K. Roy (AIR 2004 SC 1249); and
- Union of India vs Pramod Gupta (AIR 2005 SC 370)

is not entitled to any relief or damages by way of refund of the price of holograms.

CONCLUSIONS

61. Our conclusions are as follows:

- (a) In the writ petition, the validity of a circular is challenged. There is no factual dispute. The writ petition ought not to have been dismissed on the ground of alternative remedy;
- (b) The Commissioner has issued the circular dated 23.05.2001 in pursuance of the decision of the State Government to avoid smuggling and to protect the State excise duty. It is clearly a regulatory measure and is supported by rule 4 (12) of the Chhattisgarh Country Spirit Rules, 1995 framed under section 62 of the Chhattisgarh Excise Act, 1915;
- (c) The Appellant is not entitled to revision of rates or damages by way of refund of price of holograms.

62. In view of our conclusions, the writ appeal has no merit. It is dismissed. However, our reasons are other than those mentioned by the single judge.

CHIEF JUSTICE

JUDGE

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APPENDIX-1

The relevant part of Chhattisgarh Country Spirit Rules, 1995 is as follows:

4. Manufacture and Bottling—

...

(12) Cleaning, filling, Corking, Sealing, labelling, Stocking and issuing of bottles shall be done to the satisfaction of the Excise Commissioner by the licensee under the supervision and direction of the Officer-in-Charge of the Warehouse in the following manner and in such other manner as the Excise Commissioner may direct from time to time—

- (a) Each Bottle shall be thoroughly cleaned and effectively capped or corked. The licensee shall make his own arrangements for water required for washing and cleaning purpose.
- (b) Labels to be pasted on bottles shall be of quality and design as specified by the Excise Commissioner. The licensee shall have to get the labels approved by the Excise Commissioner prior to their use in Warehouses.
- (c) The labels mentioned in clause (b) above, shall also show in bold print in Hindi the price of the empty bottles refundable to the purchaser, on their return to the retail vendor.
- (d) Before the label is pasted on the bottle, the licensee shall get affixed on it, the prescribed rubber seal indicating the name of the warehouse and date of bottling. The poly-packs shall also have the details prescribed by the Excise Commissioner.
- (e) The licensee may be required to seal the bottle in the manner prescribed by the Excise Commissioner from time to time. In addition to sealed glass bottles the Excise Commissioner may introduce the system of packing of country liquor in Poly Pouches in such quantity, as may

be directed by him and the licensee shall be bound to comply with the said system.

(13) If the sealing, labelling, etc., are not of the detailed specifications as mentioned above or as directed, the Excise Commissioner may direct that sealing charges at such reduced rates may be paid as may be prescribed by him and his decision thereon shall be final.

HEADLINES

Hologram is supported by statutory provision under excise rules.