IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

THURSDAY, THE 3RD DAY OF SEPTEMBER 2015/12TH BHADRA, 1937

WP(C).No. 4631 of 2012 (D)

PETITIONER:

M/S KAY CEE DISTILLERIES,
CHENGALOOR, PUDUKKAD, THRISSUR DISTRICT,
A REGD. PARTNERSHIP FIRM REPRESENTED BY ITS
AUTHORISED SINGNITORY MR. RAJASHANKER.

BY ADVS.SRI.T.A.SHAJI (SR.)
SRI.M.A.ASIF

RESPONDENTS:
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1. STATE OF KERALA,
REPRESENTED BY THE SECRETARY TO GOVT.,
TAXES DEPARTMENT, GOVT. OF KERALA, SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

2. THE EXCISE COMMISSIONER,
COMMISSIONERATE OF EXCISE,
THIRUVANANTHAPURAM - 695 001.

3. THE JOINT COMMISSIONER OF EXCISE,
CENTRAL ZONE, ERNAKULAM.

4. THE CIRCLE INSPECTOR OF EXCISE,
KAY CEE DISTILLERIES, CHENGALOOR, PUDUKKAD,
THRISSUR DISTRICT - 680 301.

R1-R4 BY ADV. SRI. P.P PADMALAYAM, GOVERNMENT PLEADER

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
03-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P1 : TRUE COPY OF THE LICENCE UNDER FORM NO.I OF THE KERALA DISTILLERY AND WARE HOUSE RULES 1968.

EXT.P2 : TRUE COPY OF THE LICENCE UNDER FORM NO.II OF THE KERALA DISTILLERY AND WARE HOUSE RULES 1968.

EXT.P3 : TRUE COPY OF THE LICENCE UNDER FORM NO.III OF THE KERALA DISTILLERY AND WARE HOUSE RULES, 1968.

EXT.P4 : TRUE COPY OF THE LICENCE UNDER FORM NO.IV OF THE KERALA DISTILLERY AND WARE HOUSE RULES, 1968.

EXT.P5 : TRUE COPY OF THE LICENCE UNDER FORM NO.IV(A) OF THE KERALA DISTILLERY AND WARE HOUSE RULES 1968.

EXT.P6 : TRUE COPY OF THE G.O.(P)NO.97/2010/TD DTD.3.4.2010.

EXT.P7 : TRUE COPY OF THE DEMAND NOTICE DTD.2.12.2010.

EXT.P8 : TRUE COPY OF THE REQUEST DTD.9.12.2010 TO THE 1ST AND 4TH RESPONDENT.

EXT.P9 : TRUE COPY OF THE LETTER DTD.25.2.2011 OF THE 2ND RESPONDENT ADDRESSED TO THE 1ST RESPONDENT.

EXT.P10: TRUE COPY OF THE ORDER DTD.23.3.2011 OF THIS HON'BLE COURT.

EXT.P11: TRUE COPY OF THE COMMUNICATION DTD.16.8.2011 BY THE 2ND RESPONDENT ISSUED TO THE 3RD RESPONDENT.

EXT.P12: TRUE COPY OF THE GOVERNMENT LETTER DTD.30.6.2011.

EXT.P13: TRUE COPY OF THE REQUEST DATED 20.02.2013 SUBMITTED BY THE PETITIONER TO THE 4TH RESPONDENT.

EXT.P14: TRUE COPY OF THE NOTICE DATED 01.10.2013 ISSUED BY THE 4TH RESPONDENT.

EXT.P15: TRUE COPY OF THE REQUEST DATED 17.02.2014 SUBMITTED BY THE PETITIONER TO THE 4TH RESPONDENT.

EXT.P16: TRUE COPYOF THE REQUEST DATED 23.02.2015 SUBMITTED BY THE PETITIONER BEFORE THE 4TH RESPONDENT.

RESPONDENTS' EXHIBITS : NIL

/True Copy/

P.A to Judge.

DAMA SESHADRI NAIDU, J.

W.P. (C) No. 4631 of 2012 (D)

Dated this the 3rd day of September 2015

JUDGMENT

The petitioner, a Distillery, has Exts.P1 to P5 licences under the Kerala Distillery and Ware House Rules, 1968 ('the Rules' for brevity) for importing 20,000 bulk litres of Extra Neutral Alcohol (ENA).

2. On 05.11.2010, the lorry transporting the ENA from Tamil Nadu to the petitioner distillery met with an accident near Kozhikode, Kerala. In fact, the Circle Inspector of Excise, Kozhikode, prepared a mahazar and reported that 15,122 bulk litres of ENA was lost because of the accident. Nevertheless, the Circle Inspector of Excise, the 4th respondent, issued Ext.P7 notice demanding the petitioner to pay the fine on the excess wastage.

3. As is evident from the record, based on the mahazar prepared by the 4th respondent, soon after the accident on 05.11.2010, the second respondent, the Commissioner of Excise, submitted Ext.P9 communication to the Government that the wastage had not been due to the petitioner’s negligence, and that it

should be exempted from paying the fine demanded through Ext.P7.

4. When no steps had been taken by the Government despite Ext.P9 recommendation by the second respondent, the petitioner filed W.P.(C) No. 8835 of 2011 and obtained Ext.P10 interim order to have the petitioner's licence renewed without reference to Ext.P7 demand notice.

5. It is further evident from the record that through Ext.P11, the second respondent, who initially recommended exemption of the petitioner from paying the fine, nevertheless refused to withdraw Ext.P7 demand notice. Thus, acting on Ext.P11, the Government issued the consequential proceedings in Ext.P12 affirming that the petitioner should pay the fine in terms of Ext.P7 demand notice. Under these circumstances, the petitioner filed the present writ petition challenging Exts.P7, P11 and P12 proceedings of the fourth respondent, the second respondent and the first respondent respectively.

6. Shri. T.A. Shaji, the learned Senior Counsel for the petitioner, has submitted that initially the Government used to levy a duty on excess wastage, but later it changed the nomenclature from ‘duty’ to

'fine' in the light of the judgment of the Hon'ble Supreme Court in CA No. 2633 of 1999 dated 11.03.2004 that the State lacks the legislative competence to levy excise duty on rectified spirit.

7. Drawing my attention to a judgment rendered by this Court in Elite Distilleries & Beverages Co. v. State of Kerala[1], the learned Senior Counsel has contended that under identical circumstances, this Court has held that no fine can be levied against wastage caused by accident because the transporter cannot be said to be negligent on account of an unpredicted incident. Summing up his submissions, the learned Senior Counsel has urged this Court to allow the writ petition applying the ratio of Elite Distilleries (supra).

8. Per contra, the learned Government Pleader has strenuously contested the claim of the petitioner. In tune with the averments made in the counter affidavit, the learned Government Pleader has submitted that the demand of ₹ 5,07,600/- being the fine calculated for wastage of 15122 Bulk Litres of ENA as per rules, the fourth respondent demanded the said amount with justification.

9. The learned Government Pleader has submitted that there is a legal duty cast on the licensee to take necessary precautions to avoid

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leakage and loss of spirit imported. As per the FIR the loss of spirit, contends the learned Government Pleader, occurred owing to the negligence of and the over-speed indulged in by the licensee's driver.

10. It is the specific contention of the learned Government Pleader that the wastage over and above the allowable wastage as per Rule 55 of Kerala Distillery and Warehouse Rules ('the Rules' for brevity), is exigible to fine to be collected as per G.O.(P) No. 97/2010/TD dated 03.04.2010.

11. The learned Government Pleader has also contended that Rule 25 (Part I) of the Kerala Distillery and Warehouse Rules, 1968 specifies that the Government shall not be held responsible for the destruction or loss of or damage to or wastage of any spirits stored in distilleries or deposited in warehouse. According to him, the provisions of the Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975, the Distillery and Warehouse Rules, 1968, and the Rectified Spirit Rules, 1972, contemplate only allowable wastage. Any wastage over and above the permissible limits is liable for fine at ₹20/- per proof liter on the spirit lost.

12. Heard the learned counsel for the petitioner and the learned Government Pleader, apart from perusing the record.

13. The issue is whether the petitioner-distillery is required to pay any fine on wastage occurred because of an accident while the Extra Neutral Alcohol was transported.

14. Rule 7 of the Kerala Foreign Liquor (Compounding, Blending and Bottling) Rules, 1975 provides for import of ENA and the said rule, among other things, specifies that all consignments of spirits obtained by a licensee shall be verified by volume and strength jointly by the officer in charge and the licensee or his authorised agent. The net quantity received will be taken into account and verification report sent to the officer-in-charge of the distillery and the Assistant Excise Commissioner so that duty may be collected on the excess wastage, if any.

15. The said provision also further specifies that if the drums showing excess wastage are found to have been tampered with or if the wastage exceeds twice the wastage ordinarily allowed as transit wastage, the stock will be subjected to further checks and balances. The licensee shall pay duty at the tariff rate for excess wastage where

such losses could not be accounted for to the satisfaction of the Assistant Excise Commissioner.

16. Further, Rule 55 of the Rules provides for the necessary allowances for wastage. The said provision reads as follows:

> "55. Allowances for wastage.- (1) An allowance made for the loss in transit by leakage or evaporation or other unavoidable causes of spirits imported or transported under bond in wooden casks or receptacles shall be at the rate of 1% for a journey every of 400 k.m or part there of subject to a maximum of 4% for the whole journey.
> (2) If the spirits are imported or transported in metallic receptacles, tanker lorries or plastic/polythene containers, the allowance made for loss in transit by leakage and evaporation or other unavoidable causes shall be at the rate of 0.1% for a journey of every 400 k.m. or part there of subject to a maximum of 0.5% for the whole journey.
>
> Provided that if the actual loss is less than the loss as computed under sub-rule (1) or (2) allowance shall be made only for the actual loss:
>
> (3) The allowance to be made under this rule shall be determined by deduction from the quantity of spirit dispatched from the distillery or warehouse, the quantity received at the place of destination, both quantities being stated in terms of London proof Litres and shall be calculated on the quantity contained in each consignment.
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> (4) If the report of the officer by whom a consignment of spirit transported or exported has been gauged and proved on arrival at its destination shows that loss has occurred in transit to a greater extent than that prescribed by sub-rules 1 to 3 the distiller or warehouse keeper shall pay duty at the tariff rate, for the time being in force, on so much of the deficiency as is excess of the allowance so prescribed.
>
> Provided that if proved to the satisfaction of the Commissioner that such deficiency could not have prevented by the exercise of proper care and precaution, and that the spirits could not have passed into consumption, the duty levied on such deficiency shall be refunded. The

> Commissioner's decision shall be final."

(emphasis supplied)

17. As can be seen from the above extract, the proviso to Rule 55 puts the whole issue in perspective. In fact, all sorts of wastage beyond the permissible limit do not automatically attract the penalty. It is, indeed, the deficiency or wastage that could have been prevented by the exercise of proper care and precaution, but not prevented, that alone attracts the penalty.

18. Rule 11 of the Kerala Rectified Spirit Rules, 1972, which specifies the penalty that can be imposed, reads as follows:

> 11. Penalty.- Infraction of any of these rules by the permit holder or the owner of the vehicle or any person in their employment shall entail the cancellation of the permit, or imposition of fine of ₹ 25,000/- (Rupees twenty five thousand only) or confiscation of the liquor and the vehicle or with all the above punishments."

19. In fact, taking into account all the above statutory provisions, this Court in Elite Distilleries (supra) has that the purpose behind the imposition of permissible limits is to ensure that the spirit imported by a licensee is properly accounted for. But the licensee is free to prove to the satisfaction of the Commissioner that shortage could not be prevented even by exercise of proper care and

precaution, in which case the duty they paid in advance is liable to be refunded.

20. This Court has further observed that the provision essentially demonstrates that if the licensee is successful in proving that it could not prevent wastage in spite of proper care and caution and the wastage has not gone into consumption, no duty is payable on the wastage.

21. As can be seen from the pleadings, especially the counter affidavit filed by the respondents, there is no denying the fact that the wastage occurred because of accident, as had been reported by the 4th respondent through his mahazar. Interestingly, the said mahazar initially formed the basis for Ext.P9 recommendation by the second respondent not to mulct the petitioner with fine.

22. In paragraph 8 of the counter affidavit, the respondents have specifically admitted that the wastage was only due to the accident. Of course, the authorities have contended that the accident occurred owing to the negligence of the driver carrying the load of ENA.

23. Be that as it may, Rule 11 of the Rules is meant only to

ensure that unscrupulous importers do not abuse the process in the name of wastage and divert ENA for preparing illicit liquor. Once it is evident that the wastage is due to accident, and the importer cannot be found wanting in taking reasonable care, there is every justification to hold that the importer be exempted from paying fine on what is termed as excess wastage. Indeed, this Court in Elite Distilleries (supra) has categorically held to the said effect.

24. In the facts and circumstances, given the legislative intent of Rule 11 of the Rules and also the binding ratio of this Court in Elite Distilleries (supra), I am of the considered opinion that Exts.P7, P11 and P12 cannot be sustained. They are accordingly set aside.

This writ petition is allowed as above. No order as to costs.

sd/- DAMA SESHADRI NAIDU, JUDGE.

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