Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1519 OF 1998

M/s. Ruia and Ruia Pvt. Ltd. **... Petitioner**
V/s.
State of Maharashtra & Ors. **... Respondents**

Mr. D.B. Savant for the applicant/petitioner.
Mrs. M.S. Bane, AGP for the State.

CORAM : G.S.KULKARNI, J.
DATE : 30 November, 2021

P.C.:

1. Heard Mr. Savant, learned counsel for the petitioner and Ms. Bane, learned AGP for the State.

2. This petition was admitted by an order dated 17 April, 1998 passed by this Court. While admitting the petition, interim relief was granted in terms of prayer clause (b), namely, of a stay to the order dated 25 November, 1996 passed by the Inspector of State Excise making a demand of Rs.10,94,297.50 on the petitioner towards excise duty, recording a statement as made on behalf of the petitioner that the petitioner had submitted a bank guarantee for the amount demanded by the respondents to the Collector, Solapur and that the petitioner shall keep the said Bank Guarantee alive during the pendency of the petition.

3. This writ petition was dismissed for default on 31 July, 2019. An Interim Application No. 3600 of 2021 was filed praying for restoration of the petition, that is how the record of the writ petition along with the said Interim Application was before the Court, today.

4. The petitioner's interim application was allowed today by a separate order and immediately the petition was itself taken up for hearing, being of the year 1998.

5. Some facts are required to be noted. As stated in the petition, the petitioner is engaged in the business of exporting rectified spirit to foreign countries as per the licence issued in its favour, under the provisions of the Bombay Prohibition Act and Maharashtra Indian Made Foreign Liquor (Transport and Export Under Bond) Rules, 1968. During the course of such business and relevant to the controversy in the present petition, the petitioner was transporting 14000 bulk litre of rectified spirit from M/s. Sahakar Maharshi Shankarrao Mohite Patil Sahakari Sakhar Karkhana Ltd, Shankar Nagar, Aklooj to Bombay Port Trust, for export to foreign countries through cargo. For such transportation, the petitioner had obtained transport pass no. 185/96.97 dated 18

November, 1996 to transport the said spirit by tanker no. MH-04-C-1789. The transport pass specified a particular route which was from Akluj – Indapur – Bhigvan – Pune – Khopoli – Thane – Trombay road into Mumbai. However, the said tanker diverted the prescribed route under the pass and took a different route, namely, from Neera Jejuri, Pune etc.

6. The case of the petitioner is that the tanker met with an accident on 19 November, 1996 within the jurisdiction of Jejuri police station and within the limits of Pimpri Khurd village on the Neera Jejuri Road (Kms. no. 64/600). A panchnama to that effect under the signature of the witnesses and the concerned officer of Jejuri police station is annexed at page 30. The panchnama indicated that there was a deficiency in the quantity of the rectified spirit. Considering such panchnama, the Inspector of State Excise by an order dated 25 November, 1996 raised a duty demand on the petitioner of an amount of Rs.10,94,297.50 interalia recording that a deficiency of spirit was to the extent of 8758.38 litres and an excise duty at Rs.125/- per litre at an amount of Rs.10,94,297/- be recovered from the petitioner, failing which the interest at the rate of 12% p.a. would be levied as also the bank guarantee as issued by the petitioner would be encashed.

7. The petitioner being aggrieved by the said order, preferred an appeal before the Commissioner of State Excise, who by an order dated 26 November, 1996 granted ad-interim stay upto 15 February, 1997. However, before the said appeal could be disposed of, the learned Commissioner, State Excise under an order dated 30 December, 1996 directed that against the order of State Excise Officer, the appeal would in fact lie before the Collector and called upon the petitioner to file appeal before the Collector. The petitioner accordingly filed an appeal before the Collector under section 137 of the Bombay Prohibition Act, praying that the demand of Rs.10,94,297.50 as levied on the petitioner be set aside.

8. In the appeal memo filed by the petitioner, apart from the other grounds, which according to the petitioner justified the deficiency of the stock, the following ground under section 147 of the Bombay Prohibition Act was raised to contend that, the Act would not be applicable to any intoxicant or other articles which was to be exported across the customs frontier. The said ground reads thus:

> "The appellants submit that the consignment meant for export, was meant for export out of India, i.e. to Japan/ Korea and under section 147 of the Bombay Prohibition Act, nothing in this Act shall deem to apply to any intoxicant or other articles in respect of its import or

> export across the custom frontier and therefore the payment of duty within the State of Maharashtra at prevailing rate does not arise.”

9. The Collector passed an order dated 22 September, 1997 on the petitioner’s appeal holding that the petitioner is responsible for shortage of the rectified spirit and the justification which was set out by the petitioner was not acceptable considering Rule 11(1) of the Maharashtra Indian made Foreign Liquor (Transport and Export under Bond) Rules, 1968, which provided that “In the event of the transporter or exporter failing to carry the consignment to the customs station specified in the pass or, in the event of a breach by him of any of these rules, the Collector may levy on such consignment, full duty at the rates in force at the time, the pass was issued or at the time when the shortage, if any, was noticed whichever the Collector decides to levy.” The Collector also did not accept the petitioner’s submission that the deficiency was justified and/or was satisfactorily explained as per the provisions of Rule 10(2) of the said Rules. In rejecting the petitioner’s case, the Collector made the following observations:

> “7. The case papers show that the tanker No. MH-04-C-1870 which was given a Transport pass for Akluj Bombay via-Indapur-Bhigvan-Pune-Khopoli-Thane-Trombay, did not travel on this route but went on the other route of Jejuri and met with an accident. The case papers show a transport pass was issued by the Inspector of State Excise of Akluj Sugar Factory on 18 November, 1996. According to this T.P. 13 tankers were to move in convoy through prescribed route to Mumbai. While 12 tankers reached their destination, one tanker

deviated from the route and met with an accident. The panchnama by the Excise Department was done subsequently when it was noticed that this particular tanker did not reach the destination along with other 12 tankers in the convoy. The fact of accident has not been challenged by the Excise Officer. The only question is of the route which was followed by the concerned tanker. Rule 11(1) of the Maharashtra Indian made Foreign Liquor (Transport and Export Under Bond) Rules, 1968 reads as follows : "In the event of the transporter or exporter failing to carry the consignment to the customs station specified in the pass or, in the event of a breach by him of any of these rules, the Collector may levy on such consignment, the full duty at the rates in force at the time, the pass was issued or at the time when the shortage, if any, was noticed whichever the Collector decides to levy."

8. According to rule 10(2) of the same rules, "in case of any deficiency the Collector shall, unless the deficiency is satisfactorily explained, verify the dues calculated and reported by the (said) officer incharge under Rule 9 and recover the amount due from the transporter and exporter...." According to sub-rule (6) of Rule 7, the transporter or exporter shall remove the consignment under Excise escort upto such distance as may be ordered by the Collector. In the present case, one of the tankers of the company, i.e., tanker which met with the accident changed the route suo moto and it is clear that it was not under the Excise escort during its journey from Akluj to Mumbai. The appellant has not explained this deviation. It therefore, cannot be conclusively proved as to how much spirit was lost in the road accident and how much could be the deficiency due to other reasons. I, therefore, cannot be conclusively proved as to how much spirit was lost in the road accident and how much could be the deficiency due to other reasons. I, therefore, agree with the findings of the Collector that the deficiency has not been satisfactorily explained in this case. As regards the ruling of the Hon'ble Supreme Court in Synthetics and Chemicals Ltd. and Bihar Distillery case, the issues involved in these cases were different. In the Bihar Distillery case the issue involved in these cases were different. In the Bihar Distillery case, the Supreme Court ruled that the power to levy excise duty on industrial alcohol vest in Central Government in the Synthetics and Chemicals Ltd. case also the matter referred to industrial alcohol which can be consumed by normal human being. In the present case, the spirit which was being transported was rectified spirit and not denatured spirit. I, therefore, pass the following order:

> The appeal is dismissed. The order of the Collector, Solapur No. DNS-1197/7419/97 dated 5-7-1997 is confirmed. The stay granted vide this office order of even number dated 21-7-1997 is hereby vacated.

10. The Collector, accordingly, did not find merit in the petitioner's appeal and confirmed the demand of Rs.10,94,297.50 towards short receipt of rectified spirit as per Rules 10, 11 of the Rules and directed that such payment be made within 15 days of the said order, failing which the bank guarantee would be encashed.

11. Being aggrieved by the order dated 5 July, 1997 passed by the Collector, the petitioner filed an appeal under section 137 of the Bombay Prohibition Act before the Commissioner of State Excise, Maharashtra, who dismissed petitioner's appeal by an order dated 22 September, 1997 and also vacated the stay.

12. The petitioner, being aggrieved by the order passed by the Commissioner of State Excise, Maharashtra, filed a revision before the Principal Secretary, Government of Maharashtra, Home Department under section 138 of the Bombay Prohibition Act. In the Revision, the petitioner specifically raised a contention as raised before the Commissioner and as noted above namely that the provisions of Bombay Prohibition Act, were not applicable in view of Section 147 of the Bombay Prohibition Act and rules made thereunder when the spirit was intended to be exported across the custom frontier. By the impugned order dated 6 February, 1998,

the Principal Secretary has dismissed the petitioner's revision on the only finding as recorded in paragraph 6, which reads thus:

> "6. I have gone through the relevant files and the pleadings of the petitioner. As pointed out by the Commissioner in his order, the tanker in question had changed the route and therefore, it was not under Excise escort during the journey from Akluj to Mumbai. Therefore, it was not possible to conclusively establish how much spirit was lost due to the accident. Since the deficiency has not been satisfactorily explained, the demand made on the petitioner firm is as per rules. I am also in agreement with the views of the Commissioner that the present case is not covered by the decision of the Hon'ble Supreme Court in the Bihar Distillery case. The revision petition is, therefore, dismissed."

13. Mr. Savant, learned counsel for the petitioner would urge that the petitioner's specific case in regard to non-applicability of the provisions of Bombay Prohibition Act has not been considered by both the Appellate Authorities as also by the Revisional Authority. He submits that there was sufficient material on record, which according to Mr. Savant would indicate that the spirit in question was being transported to be exported across the customs frontier and hence the provisions of Bombay Prohibition Act would not be applicable to the consignment in question.

14. Learned AGP also could not demonstrate any observation in the impugned order which would show that the authorities below have applied their mind on this aspect, which according to Mr. Savant goes to the root of the matter.

15. In the above circumstances, in my opinion, the petition is required to be disposed of by remanding the matter to the revisional authority, who shall consider the petitioner's contention on Section 147 of the Bombay Prohibition Act, namely, that the Bombay Prohibition Act was not applicable to the consignment in question on which a demand was made of Rs.10,94,297.50 by the order passed by the Inspector, State Excise dated 25 November, 1996 and as confirmed by the appellate authority and revisional authority. Except such issue, the petitioner would not be permitted to raise any other issue, which were not raised on the earlier occasion and hence, the petitioner cannot have a chance to improve its case than what was originally agitated before the appellate authority or revisional authority. The petition is accordingly disposed of by the following order:

O R D E R

(i) The matter is remanded to the revisional authority (Principal Secretary), who shall consider the petitioner's plea as raised under section 147 of the Bombay Prohibition Act in regard to the applicability of the said Act to the consignment in question and subject matter of the demand of Rs.10,94,297.50 issued against the petitioner by an order dated 25 November, 1996 of the Inspector, State Excise.

(ii) The Revisional Authority after deciding the issue as directed in (i) above shall pass appropriate orders in regard to the maintaining of the demand against the petitioner under order dated 25th November 1996 of the Inspector of State Excise or otherwise.

(iii) At the first instance, the petitioner is directed to remain present before the revisional authority on 16 December, 2021 at 2.30 p.m.

(iv) The revisional authority shall accordingly fix any convenient date for hearing of the proceedings and after hearing the representative of the department and the petitioner and after examining the record, pass appropriate order in accordance with law within a period of six weeks from 16 December, 2021.

(v) The bank guarantee of the petitioner is directed to be kept alive till the final disposal of the revision proceedings by the revisional authority and for a period of two weeks thereafter.

(vi) All contentions of the petitioner on the issue being remanded are expressly kept open.

16. Rule is made absolute in the above terms. No order as to costs.

17. Parties to act on the authenticated copy of the order.

(G.S.KULKARNI, J.)

VIDYA SURESH AMIN

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