

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10721 OF 2013
(Arising out of SLP(C) No. 16580 of 2010)

|M/s United Spirits Limited |...Appellant(s) |

Versus

|State of Kerala and Ors. |...Respondent(s) |

O R D E R

1. Leave granted.

2. This appeal by special leave is directed against the judgment and order passed by the High Court of Kerala in W.A. No. 1368 of 2007, dated 22.01.2010. By the impugned judgment and order the High Court has come to the conclusion that the excise duty element requires to be paid by the Kerala State Beverages (Manufacturing and Marketing) Corporation Ltd. (for short, "KSBC") to the manufactures/ distillers of the Indian Made Foreign Liquor (for short, 'IMFL') and the amount so paid shall form the part of sale consideration and thus ought to be included in the turnover of the manufacturers/ distillers for the purpose of computation of turnover tax under the Kerala General Sales Tax Act, 1963 (for short, "the KGST Act") and therefore, dismissed the appeals filed by the manufacturers/ assessees.

3. The case genealogy traverses through a decade splitting across the amendment to the Rule 13 (9) of the Foreign Liquor Rules, 1953 (for short "the Rules") and therefore, brevity causa we would only recapitulate the facts relevant to the disposal of the instant appeal.

4. The appellant is the manufacturer of IMFL licensed under Sections 12 and 14 of the Kerala Abkari Act 1 of 1977 (for short, "the Act") and an assessee under the KGST Act. The KSBC, respondent No.3, is a State owned corporation and since 01.04.1984 is the exclusive whole-sale dealer of liquor within the State of Kerala, licensed in that behalf under the Act. The assessee/manufacturer cannot sell the IMFL manufactured by them to anyone except the KSBC. The IMFL was required to be delivered to the KSBC and stored in bonded warehouses by the KSBC in accordance with the Foreign Liquor (Storage in Bond) Cochin Rules, 1961 (for short "the Bond Rules"). The price paid by the KSBC did not include the element of excise duty which was later paid by KSBC when the liquor moved out of its storage warehouse and therefore, the assessments were made from time to time on the basis that liability to pay sales tax and excise duty was on the KSBC. The manufacturer paid turnover tax on the basis of prices paid to it by the KSBC and hence did not include the excise duty element while computing their total turnover. It appears from the record that in 1998, the State took the stand that the duty paid by the KSBC is an excise duty, a levy on the manufacture of goods and since such payment is on the account of the manufacturer, the manufacturer ought to have included the same in its

taxable turnover and accordingly paid the turnover tax thereto. This led to issuance of notices by the State to the manufacturers under Section 35 of the KGST Act for non-payment of turnover tax by non-inclusion of element of excise duty payable on IMFL, objections thereto, assessment orders, penalty orders, follow up notices to produce books of accounts for re-opening assessments on ground of escaped turnover etc.

5. The manufacturers filed first batch of writ petitions, O.P. 818 of 1999 and connected matters before the High Court, wherein, the Division Bench observed, that, the levy of excise duty in terms of Section 17(f) of the Act read with Rule 11 of the Bond Rules comes into operation at a stage after the property in goods has been transferred to the KSBC and thereafter, the duty paid by the KSBC can neither be treated as the part consideration received by the manufacturer from the KSBC nor be treated as payment by the KSBC on behalf of the manufacturer and thus, cannot be treated as part of the turnover of the manufacturer so as to attract any turnover tax at the hands of manufacturer by the judgment and order dated 27.11.1999. Against the aforesaid judgment and order, the State preferred Civil Appeal Nos. 2249-2257 of 2000 before this Court which was referred to Constitution Bench for consideration.

6. In the meanwhile, an amendment w.e.f. 05.01.1999 was made to the Rule 13(9) of the Rules whereby the bonded warehouse system was abolished and therefore, the KSBC became obliged to remit the excise duty before lifting the goods from manufacturer to its wholesale warehouse. The validity of the said amendment was not challenged by the assessee/manufacturers.

7. During pendency of the said appeals, on 01.04.2001 the KGST Act was amended by addition of explanation to Section 5(2C) of the KGST Act with retrospective effect from 01.07.1987, to the effect that the duty paid by KSBC is to be treated as part of the turnover of the manufacturer whether paid by the manufacturer or KSBC. The second batch of writ petitions was preferred before the Division Bench challenging the introduction of the said explanation and further assessment proceedings. The Division Bench allowed the said petitions and held the Explanation to Section 5(2C) of the KGST Act as unconstitutional both retrospectively and prospectively by its judgment and order dated 09.08.2002. The State filed Civil Appeal No. 95 of 2003 and others against the said judgment and order.

8. Further, by Finance Act 2003 Sections 17 and 18 of the Act, the charging provision and method of levy, respectively, were amended. Section 17 was amended prospectively restricting the points of levy to imports and manufacture and omitting the other points of levy such as issue from the bonded warehouse, exports and transportation. Section 18 was amended retrospectively w.e.f. 01.04.1984, inter alia providing that the excise duty shall be payable by the manufacturer. Subsequently by Finance Act 2004, the definition of 'turnover' was amended by inserting clause (iv) to Explanation (1A) to Section 2(xxvii) of the KGST Act so as to include any duty of excise payable by the manufacturer and the charging section, Section 5(2C)(i) was amended by inserting sub-clause (c) so as to make the manufacturer liable to pay tax on the turnover by including such duty even if paid by a subsequent dealer. The aforesaid amendments were challenged before the High Court in Writ Petitions O.P. 28148 of 2003 and connected matters.

9. This Court in State of Kerala & Ors. vs. Maharashtra Distilleries Ltd And Anr., (2005) 11 SCC 1, examined Sections 17 and 18 of the Act, as they stood at the relevant time, and the provisions of the Rules as also the amendments made to Sections 17 and 18. It was held that the Rules leave no manner of doubt that they create a complete monopoly in favour of KSBC insofar as wholesale trade in IMFL is concerned and that the levy of duty is not a levy in the nature of duty of excise but is the privilege price payable by KSBC in consideration of the State parting with its exclusive privilege of wholesale trade in IMFL in favour of the KSBC. This Court further noted that w.e.f. 05.01.1999, in view of the amendment to the Rules, KSBC could not purchase IMFL from the manufactures/distillers without payment of duty and in view of such amendment, KSBC had to pay duty before it could lift the stock of IMFL from the manufacturers' warehouses

to its own licensed premises. As a consequence, the KSBC had to pay to the manufactures/distillers the duty payable in respect of IMFL and therefore, in any event, the manufactures/distillers are bound to include in their turnover, the amount of duty since that formed part of the consideration of the sale of IMFL to KSBC w.e.f. 05.01.1999.

10. The writ petitions O.P. 28148 of 2003 and others were amended thereby challenging the amendment to the Rules w.e.f. 05.01.1999, the amendment made to Section 5(2C) of the KGST Act and Section 18 of the Act. The learned Single Judge after due appreciation of the Constitution Bench decision has held that the said amendments impugned by the manufactures/distillers would not enable the State to consider the duty paid by the KSBC before 05.01.1999 as the turnover of the manufactures/distillers and accordingly held that the retrospective amendment would not stand in view of the authoritative declaration in the case of Maharashtra Distilleries (supra) regarding the nature of the transaction between the KSBC and the manufactures/distillers before 05.01.1999 and therefore, declared that the State cannot take any action against the manufactures/distillers to re-open the assessment of turnover tax made for the period prior to 05.01.1999 on the strength of the amendment made to the Act and the KGST Act as per the Finance Acts of 2003 and 2004. However, in respect to the challenge to the amendment made to the Rules w.e.f. 05.01.1999, it has held that in view of the decision of this Court in Maharashtra Distilleries (supra), there is no other interpretation to the rules that could be accepted and that all questions in that regard, including on facts, stand concluded by the aforesaid judgment.

11. Aggrieved by the aforesaid, the assessee preferred an appeal before the Division Bench of the High Court. The Division Bench has discussed the contentions of parties to the lis in extenso and reached the conclusion that in light of the binding precedent in the case Maharashtra Distilleries (supra), the learned Single Judge was justified in concluding that the amendment to the Rules w.e.f. 05.01.1999, brought a fundamental change in the nature of transaction between KSBC and the manufacturers/distillers and shifted the liability of payment of excise duty from KSBC to the manufacturers/dealers and therefore, dismissed the appeals.

12. It is the aforesaid judgment and order against which the appellant-assessee is before us in this appeal by special leave.

13. The lis herein relates to the period subsequent to 05.01.1999. The assessee impugns the said judgment and order in respect of the observations made by the Division Bench for the aforesaid period and contends that the amount paid by the KSBC as the duty of excise/privilege price is not liable to be included in the turnover of the assessee for the purpose of computation of turnover tax under the KGST Act.

14. In our considered view, the issue that is raised by the appellant in this appeal is squarely covered by the decision of the Constitution Bench of this Court in the case of Maharashtra Distilleries (supra).

15. Shri V. Giri, learned senior counsel appearing for the appellant would seek to distinguish the aforesaid Constitution Bench decision and contend that since the assessee/manufacturer has not received the excise duty element from KSBC and KSBC has paid the said amount to the State directly, therefore, the manufacturer need not have to include the excise duty element in its turnover for the purpose of payment of turnover tax under the KGST Act.

16. Out of sheer deference to the learned senior counsel, we have carefully gone through the Constitution Bench decision in Maharashtra Distilleries (supra). This Court has at various places has drawn distinction between payment of the excise duty/privileged price prior to and after the amendment of the Rules w.e.f. 05.01.1999. This Court noticed the amendment to the Rules and observed, that, the said amendment was brought about by the State to avoid duplication of work as under the unamended provision the KSBC had to keep the stock of IMFL in the Bonded Warehouses and when the stock was taken out for supply to other licensees excise duty had to be paid by the KSBC. This system being done away with by

amendment of Rule 13(9), the KSBC was obliged to pay the excise duty on the IMFL to the manufacturer and thereafter lift liquor duty paid for supply to other licensees. To further clarify, we would quote certain paragraphs from the judgment:

"21. This fact has been noticed by the High Court in its judgment in the first batch of writ petitions. The Court after noticing the said amendment observed that with effect from 5th January, 1999, in view of the amendment of the Foreign Liquor Rules, the KSBC had been purchasing IMFL from the manufacturers after payment of excise duty. All sales of liquor by the manufacturers to the Corporation took place after the excise duty had been remitted by the KSBC with the result that the system of Bonded Warehouse in so far as IMFL is concerned was done away with. The KSBC paid excise duty on IMFL before it purchased the same from the concerned manufacturer and therefore the amount of excise duty was paid by the Corporation when it purchased IMFL from the manufacturer. The amount of excise duty paid formed part of consideration for which the property in the goods viz. IMFL was purchased by the Corporation from the manufacturer concerned. It was only after payment of the excise duty that the goods were consigned to the concerned IMFL licensed premises owned and controlled by the KSBC.

28. As we have noticed earlier, with effect from 5-1-1999, by amendment of the Foreign Liquor rules, KSBC was required to pay to the distillers/manufacturers, the duty element levied under Section 17; before removing IMFL to its licensed premises."

(emphasis supplied)

17. Further in paragraph 28, this Court has categorically observed that w.e.f. 05.01.1999 by amendment of the Rules, KSBC was required to pay to the distillers/manufacturers the excise duty element levied under Section 17 of the Act before removing IMFL to its licensed premises. A reading of the afore extracted paragraphs would clearly indicate that w.e.f. 05.01.1999, KSBC was required to pay to the manufactures the duty element as envisaged under 17 of the KGST Act before it could remove IMFL to its licensed premises. Therefore, after amendment the obligation is on the part of the KSBC to pay the excise duty element to the manufacturer and such being the case, the sale consideration of the IMFL would necessarily include the excise duty element.

18. In the aforesaid decision once again this Court at paragraph 89 has reiterated the shift of the tax liability from KSBC to the manufacturers after the amendment. This Court has observed that before the amendment, the duty imposed was not a duty of excise but represented the privilege price charged by the State from KSBC as a consideration for parting with its exclusive privilege to sell liquor by wholesale in the entire State and therefore, the manufacturers were not liable to include that duty paid by the KSBC in their turnover. However, the said position changed radically post-amendment as the KSBC could not purchase IMFL from the manufacturers without payment of duty. It had to pay duty before it could lift the stock of IMFL from the manufacturers' factory or warehouse to its own licensed premises. Thus the KSBC paid to the manufacturers the duty payable in respect of IMFL and consequently the amount of duty paid formed part of the consideration for which the property in goods passed to the KSBC. The relevant paragraph is extracted hereunder:

"89. ...We have earlier noticed the amendments made to the Foreign Liquor Rules which leave no room for doubt that with effect from January 5, 1999 the manufacturers/ distillers (respondents herein) were bound to include in their turnover the amount paid to them by the KSBC by way of duty levied under the Abkari Act together with the price of the liquor purchased from them. The learned Judges (High Court) noticed this fact but granted relief in broad terms as prayed for by the respondents. In our view the High Court fell into an error in doing so. It ought to have held that in any event with effect from January 5,1999 the respondents-manufacturers/distillers were bound to include in their turnover the amount of duty paid to them by the KSBC since that formed part of the consideration for sale of IMFL to the said Corporation. We, therefore, hold that from

January 5, 1999, the date with effect from which the KSBC started paying duty to the manufacturers/distillers before lifting the stock of IMFL to its own licensed premises, the amount of duty paid formed part of the consideration paid by the Corporation to the manufacturers and consequently it formed part of the turnover of the manufacturers."

(emphasis supplied)

19. In view of the observations made by Constitution Bench of this Court, in our considered opinion, the High Court was justified in reaching its conclusion and dismissing the appeal filed by the appellants.

20. We are bound by the observations made by the Constitution Bench of this Court and subscribe to the view that has already been taken and explained by the Constitution Bench of this Court. We reiterate that when KSBC intends to lift IMFL from the manufacturer/ distillers, it has to pay the excise duty element to the manufacturer/ distillers. The amount so paid would form a part of the sale consideration and thus requires to be included in the turnover of the manufacturer/distiller. If the said turnover exceeds the statutorily prescribed limit, the manufacturer/ distiller would be liable to pay the turnover tax accordingly.

21. In that view of the matter we see no good reasons to interfere with the judgment and order passed by the Kerala High Court.

22. In the result, the Civil Appeal stands dismissed accordingly.

CIVIL APPEAL NOS.10945-10946 OF 2013 @
SLP(C) NOS. 20050-20051 OF 2013,
CIVIL APPEAL NO.10947 OF 2013 @ SLP(C) NO.16723 OF 2010,
CIVIL APPEAL NO.10948 OF 2013 @ SLP(C) NO.16746 OF 2010,
CIVIL APPEAL NO.10949 OF 2013 @ SLP(C) NO.16747 OF 2010,
CIVIL APPEAL NO.10950 OF 2013 @ SLP(C) NO.16795 OF 2010,
CIVIL APPEAL NO.10951 OF 2013 @ SLP(C) NO. 1476 OF 2011,
CIVIL APPEAL NO.10952 OF 2013 @ SLP(C) NO. 1477 OF 2011.

Leave granted.

The appeals are dismissed in terms and observations in Civil Appeal arising out of S.L.P.(C) No. 16580 of 2010.
Ordered accordingly.

S.L.P.(C) Nos. 19087-19085 of 2010 and 6413 of 2011

In view of order passed in Civil Appeal arising out of S.L.P.(C) No. 16580 of 2010, in our opinion, the High Court has not committed any error, whatsoever, which calls for our interference. Therefore, we decline to entertain these petitions.

The special leave petitions are dismissed accordingly.

.....J.
[H. L. DATTU]

.....J.
[SUDHANSU JYOTI MUKHOPADHAYA]

NEW DELHI,
NOVEMBER 28, 2013.

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8500 OF 2010

|Polsons Distilleries

|...Appellant(s)

Versus

|Assistant Commissioner (Assessment) Commercial|...Respondent(s)

|Taxes, Special Circle, Trichur & Ors.

O R D E R

1. This appeal is directed against the judgment and order passed by the High Court of Kerala in W.P. (C) No. 12901 of 2009, dated 21.12.2009.

2. Shri Rajiv Dutta, learned senior counsel appearing for the appellant states that the prayer made in the Writ Petition filed before the High Court is totally different from the prayer that was made in S.T. Revision No. 175 of 2009 and connected matters thereto and therefore, submits that the High Court has committed a grave error while passing the impugned order.

3. We have heard learned counsel for the parties to the lis.

4. After carefully going through the impugned judgment and order passed by the High Court and in view of the peculiar facts and circumstances of the case, we are of the opinion that in a case of this nature the appellant in the first instance should have filed an appropriate Review Petition before the High Court itself bringing to its notice that the prayer(s) made in W.P.(C) No. 12901 of 2009 is entirely different from the prayer(s) made in S.T. Revision No. 175 of 2009 and connected matters thereto.

4A. In view of the above, we permit the appellant to file appropriate Review Petition in W.P.(C) No. 12901 of 2009 before the High Court within a month's time from today. If such a petition is filed within the time granted by this court, the Writ Court will consider the same on merits without reference to the period of limitation.

5. The appeal is disposed of accordingly.

.....J.
[H.L. DATTU]

NEW DELHI,
NOVEMBER 28, 2013.

ITEM NO.101(PH) COURT NO.4 SECTION IIIA
S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CIVIL APPEAL NO(s). 8485-8491 OF 2010

M/S KAYCEE DISTILLERIES Appellant (s)

VERSUS

STATE OF KERALA Respondent(s)
(With office report)

WITH

Civil Appeal NO. 8492-8500 of 2010
(With appln.(s) for permission to file addl.documents and office report)

Civil Appeal NO. 4617-4618 of 2012
(With prayer for interim relief and office report)

Civil Appeal NO. 1937-1940 of 2011
(With appln.(s) for directions and office report)

Civil Appeal NO. 5726 of 2011
(With prayer for interim relief and office report)

SLP(C) NO. 20050-20051 of 2013
(With prayer for interim relief and office report)

SLP(C) NO. 16580 of 2010
(With prayer for interim relief and office report)

SLP(C) NO. 16723 of 2010
(With prayer for interim relief and office report)

SLP(C) NO. 16746 of 2010
(With prayer for interim relief and office report)

SLP(C) NO. 16747 of 2010
(With prayer for interim relief and office report)

SLP(C) NO. 16795 of 2010
(With prayer for interim relief and office report)

SLP(C) NO. 19087-19095 of 2010
(With office report)

SLP(C) NO. 1476 of 2011
(With office report)

SLP(C) NO. 1477 of 2011

(With office report)

SLP(C) NO. 6413 of 2011
(With office report)

Date: 28/11/2013 These Appeals/petitions were called on
for hearing today.

CORAM :

HON'BLE MR. JUSTICE H.L. DATTU
HON'BLE MR. JUSTICE SUDHANSU JYOTI MUKHOPADHAYA

For Appellant(s) Mr.V.Giri, Sr.Adv.
In CAs.8485-91/10/ Mr. E.M.S. Anam,Adv.
Respondent(s)

Mr. Shree Pal Singh, Adv.

Mr.Rajiv Dutta, Sr.Adv.
Mr.Sanjeev Kr.Singh, Adv.
Mr. Siddhartha Chowdhury, Adv.

Mr.V.Giri, Sr.Adv.
Mr.Dileep Pillai, Adv.
Mr.Ajay K.Jain, Adv.
Mr. Mohd. Sadique T.A., Adv.
Mr. M.P. Vinod, Adv.

Ms. Liz Mathew, Adv.

Mr. Vikas Mehta, Adv.
Ms.Aditi Mishra, Adv

Mr.V.Giri, Sr.Adv.
Mr.Harshad V.Hameed, Adv.
Mr. Neeraj Shekhar, Adv.

For Petitioner/
Respondent- Mr. Ramesh Babu M.R., Adv.
State

For Respondent(s) Mr. R. Sathish,Adv.

Mr. M.T. George, Adv.
Ms.Kavitha, K.T.,Adv.

Ms. Bina Madhavan, Adv.

Ms. Liz Mathew, Adv.

Mr. Himinder Lal, Adv.

UPON hearing counsel the Court made the following
O R D E R

SLP(C) Nos. 16580/2012, 20050-20051/2013, 16723/2010,
16746/2010, 16747/2010, 16795/2010, 1476/2011, 1477/2011

Leave granted.

The appeals are dismissed in terms of the signed order.

SLP(C) Nos.19087-19095 of 2010, 6413 of 2011

In view of order passed in Civil Appeal arising out of S.L.P.(C) No. 16580 of 2010, in our opinion, the High Court has not committed any error, whatsoever, which calls for our interference. Therefore, we decline to entertain these petitions.

C.A. No. 8500 of 2010

The appeal is disposed of. in terms of the signed order.

In Rest of the matters

Learned counsel for the appellants may file written submissions in one week's time.

List the matters on 05.12.2013 as part-heard.

	[Charanjeet Kaur]		[Vinod Kulvi]	
Court Master		Asstt. Registrar		

[Two signed orders are placed on the file]