A GOVERNMENT OF HARYANA

v.

HARYANA BREWERY LTD. AND ANR.

FEBRUARY 12, 2002

B [B.N. KIRPAL, SHIVARAJ V. PATIL AND BISHESHWAR PRASAD SINGH, JJ.]

Punjab Excise Act, 1914/Punjab Brewery Rules, 1956—Ss. 31 and 32/ Rule 35—Manufacture of beer—Excise Duty—Levy of—Held, can be levied only after the process of manufacture was completed and has became fit for human consumption—Tax is on the end product and not on the raw material.

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Appellant—Excise authorities issued a show cause notice to the respondent imposing excise duty on the beer brewed sating that the wastage referred to in Rule 35 was more than 10 percent for the period 1986-87 and earlier, and more than 7 percent in the later years. Respondent raised a plea before the excise authorities, that the percentage of wastage should have been more than 7 or 10 percent. The said plea was rejected. Thereafter respondent filed a writ petition before the High Court contending that it was not permissible for the excise authorities to levy excise duty at the stage before potable beer becomes fit for human consumption. High Court quashed the demand by holding that on the actual quantity of potable beer manufactured by the respondent allowance of 7 percent should be given and then duty determined. Hence the present appeal.

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F **On behalf of appellant it was contended that the State is not proposing to levy any excise duty on beer which had not been manufactured and had not become fit for human consumption, and that the High Court has not correctly construed the different provisions of the Act and Rules.**

On behalf of respondents it was contended that excise duty was payable only after all the process in the manufacture of beer have been completed and on the end-product an exemption of 7 percent was to be allowed.

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Allowing the appeal and setting aside the order of High Court, the Court

HELD : 1. The state has jurisdiction to levy excise duty only on beer after it has been brewed and has become fit for human consumption. Resorting

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to Rule 35 of the Punjab Brewery Rules and calculating the quantity of beer which is manufactured and is fit for human consumption cannot be said to be invalid or impermissible. [950-H] A

1.2. A reading of Section 32 of the Punjab Excise Act leaves no manner of doubt that the stage at which excise duty can be levied is only after the process of manufacture has been completed and in fact, it is to be levied when it is issued from the distillery, brewery or warehouse. The tax is on the end-product and not on the raw material. The allowance of 7 percent has to be in arriving at the figure of the manufactured beer as loss of quantity during the process of manufacture. It cannot be that on the figure of manufactured beer, arrived at on the basis of the books of the respondent, an allowance of 7 percent has to be given. If the figure taken for the purpose of calculating the excise duty is only of the end-product, *viz.*, the beer produced, and not the quantity of raw material used in the manufacture of beer during which loss of some quantity as wastage would have occurred, there cannot be a deduction of any sum of proportion as wastage from the quantity of end-product in order to arrive at that quantity. The excisable produce is the quantity of beer produced and not the quantity produced, and thus excisable, minus 7 percent. The allowance is contained in the proviso to Section 32 read with Rule 35. If the entries in the brewing book of the licensee or in the survey book of the Inspector are not to be taken into consideration, then the question of giving an allowance of 7 percent contemplated by Rule 35 would also not arise. [950-E, G] B C D E

2. However, in the instant case, before the Excise Commissioner no dispute has been raised with regard to the figures and the contention was that the percentage of wastage should have been more than 7 or 10 percent. Thus the matter is remanded to the Financial Commissioner for a fresh decision in accordance with law and in the light of the observations made in this judgement. [951-E, G] F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1999 of 1997.

From the Judgment and Order dated 22.7.96 of the Punjab and Haryana High Court in C.W.P. No. 18750 of 1995. G

Mahendra Anand, Anil B. Divan, Y.V. Giri, S. Ganesh Neeraj Kumar Jain, Aditya Kumar Chaudhary, J.P. Dhanda, Mahesh Agarwal, Manu Krishnan, Rishi Agarwal, E.C. Agrawala, Praveen Kumar for applicants in Intervention Application), Prateek Jalan, R.N. Poddar and B.V. Balaram Das, H

A for the appearing parties.

The Judgment of the Court was delivered by

KIRPAL, J. The challenge in this appeal is to the decision of the High Court relating to levy of excise duty on the beer brewed by the respondent.

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This appeal arises from the decision of the High Court which had allowed the respondent's writ petition and quashed the demand raised by the appellant in respect of the years 1986-87, 1987-88 and 1988-89. According to the appellant, this demand was raised because the wastage which was shown by the respondent in the brewing of beer was more than 10 per cent C prior to the year 1986-87 and 7 per cent thereafter.

In Order to understand the controversy, it is necessary to first examine the process in connection with the manufacture of beer. This process has been referred to by this Court in *Mohan Meakin Ltd.* v. *Excise and Taxation Commissioner, H.P. and Ors.*, [1997] 2 SCC 193 and described at page 196 D as follows:-

> "The first stage brewing process is the feeding of malt and adjuncts into a vessel known as Mash Tin. There it is mixed with hot water and maintained at certain temperature. The objective of this process is to convert the starches of the malt into fermentable sugar.
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> The extract is drawn from the Mash Tin and boiled with the addition of hops for one to two hours after which it is centrifuged, cooled and received in the receiving Vats. At this stage, it is called 'Wort and contains only fermentable sugars and no alcohol. After this, it is transferred to the fermentation tanks where yeast is added F and primary fermentation is carried out at controlled temperature. After attenuation (diminution of density of 'Wort' resulting from its fermentation) is reached for fermented wort is centrifuged and transferred to the storage vats for secondary fermentation. After secondary fermentation is over in the storage vats, it is filtered twice— G first through the rough filter press and then through the fine filter press and received in the bottling tanks. It is in bottling tanks that the loss of the carbon dioxide gas is made up and bulk beer is drawn for bottling. It is filed into the bottles and then last process of pasteurisation is carried out to make it ready for packing and marketing. Till the liquor is removed from the vats and undergoes the fermentation process H as mentioned above the presence of alcohol is nil."

Section 3 of The Punjab Excise Act, 1914, as applicable to the State of Haryana, specifies the 'exciseable articles' and one of the articles is alcoholic liquor for human consumption. Sections 31 and 32 which deal with the levy of excise duty read as follows:

"31. Duty on excisable articles:- An excise duty or a countervailing duty as the case may be at such rate or rates as the State Government shall direct, may be imposed either generally or for any specified local area, on any excisable article:

(a) imported, exported or transported in accordance with the provisions of Section 16; or

(b) manufactured or cultivated under any licence granted under Section 23; or

(c) manufactured in any distillery established or any distillery or brewery licensed under Section 21;

Provided as follows;

(i) duty shall not be so imposed on any article which has been imported into India and was liable on importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1878;

Explanation : Duty may be imposed under this Section at different rates according to the places to which any excisable article is to be removed for consumption, or according to the varying strength and quality of such article."

"32, Manner in which duty may be levied:- Subject to such rules regulating the time, place and manner as the Financial Commissioner may prescribe, such duty shall be levied rateably, on the quantity of exciseable article imported, exported, transported, collected or manufactured in or issued from, a distillery, brewery or warehouse:-

Provided that duty may be levied:-

(a) On intoxicating drugs, by an average rate levied on the cultivation of the hemp plant or by a rate charged on the quantity collected;

(b) on spirit or beer manufactured in any distillery established or any distillery or brewery licensed, under this Act in accordance with such scale or equivalents calculated on the quantity of

materials used or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe:

(c) on tari, by a tax on each tree from which the tari is drawn:

Provided further that where payment is made upon issue of an exciseable article for sale from a warehouse established or licensed under Section 22(a) it shall be made—

(a) if the State Government by notification so directs, at the rate of duty which was in force at the date of import of that article; or

(b) in the absence of such direction by the State Government, at the rate of duty which is in force on that article on the date when it is issued from the warehouse."

These two provisions have to be read with Rule 35 of the Punjab Brewery Rules, 1956, which reads as follows:

"35(1). The duty on beer, at the prescribed rate, shall be charged on the total quantity actually brewed as entered in the brewing book by the licensee or as ascertained by the Inspector and entered in his survey book from B.6, whichever is higher, less an allowance of seven per cent for wastage.

(2) The duty on beer shall become due immediately the account of brewing has been taken by the Inspector. An account of duty to be realised on collection of daily brews shall be maintained by the Inspector in the registered in form B.15A.

(3) The Excise Commissioner may, however, cause the charge to be made up at the close of each quarter in respect of all the brewings within that quarter and may, if the licenses executes a bond in form B.16 for its payment, defer the payment to a date not later than the fifteenth day of the month succeeding the quarter in respect of which the duty was charged. The Inspector shall at the end of each quarter prepare Beer Duty Voucher in form B.7 and shall cause a notice in form B.8 to be served upto the license for the payment of the amount.

(4) At the end of each quarter the Inspector shall prepare an abstract of brewing operations in form B.11 and a statement showing the quantity of beer issued to troops in Punjab and other States in

form B.14 during the quarter. The abstract and the statement shall be submitted to the Collector concerned who after check will forward them to be Excise Commissioner. A

(5) The Inspector shall also maintain a register in form B.15 showing issue of beer made to other State."

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The excise authorities purported to apply the provisions of Rule 35 in order to calculate the amount of excise duty payable by the respondent. Show cause notices were issued to the respondent wherein it was stated that the wastage referred to in Rule 35 was more than 10 per cent for the period 1986-87 and earlier and more than 7 per cent in the later years. It may here be noticed that for the period 1986-87 and earlier the wastage allowed was 10 per cent which was reduced to 7 per cent from August 1986 onwards. The plea taken by the respondent before the excise authorities was that the rate of wastage should have been more than what was prescribed. This plea was not accepted. Appeal was filed and after remand a fresh order was passed by the Excise Commissioner. The relevant part of this order is as follows: C D

"1. Rule 35(1) clearly lays down that duty is to be paid either on the quantity brewed as entered in the brewing book by the licensee or as ascertained by Inspector and entered in Form B-6 by him whichever is higher. In form B-6, the quantity of worts collected is shown under column 51 after the worts are received in the collecting or fermenting vessel. The Brewery has not produced their brewing book to show any discrepancy and even otherwise the rule clearly lays down that in the event of a discrepancy the higher figure is to be taken. Hence this argument does not help the brewery. E

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2. A perusal of the Form in B-6 and Part-8 in Form B-12 clearly shows that the quantity considered to be brewed is after all the various processes are finished and the brewed liquor is received ready of bottling or to be issued in bulk. In fact, even loss in fermentation is permitted to be shown and the wastage is calculated only after allowing all the above in column 15. Hence there is no force in the argument advanced by the brewery regarding the loss in various processes. G

3. In so far as the contention of the Brewery that duty can be levied only on consumption and not on wastage is concerned, as pointed out by me above, the scheme of the rules is that the duty is first levied on the total quantity brewed and refunds are allowed on H

A export etc., since the scale of wastage allowed for calculating wastage is prescribed duty has to be charged on the remainder.

4. There is no force in the plea that the Haryana Brewery being a Govt. Undertaking is exempt. The rules do not make any distinction and perhaps no such distinction would be permissible either."

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The aforesaid decision of the Excise Commissioner was upheld in appeal.

In the writ petition which was filed, it was contended by the respondent before the High Court that what the excise authorities were seeking to do was to levy the excise duty at a stage before it became potable liquor fit for C human consumption. This, it was contended, was not permissible in view of settled legal position in that behalf, namely, that the State can only impose excise duty on potable liquor for human consumption and nothing else.

High Court construed the provisions of the Act and the Rules and D purporated to follow the decision of this Court in *State of U.P. and Ors.* v. *Modi Distillery and Ors. etc.*, [1955] 5 SCC 753, and observed that excise duty was being imposed not on the beer manufactured by the respondent but on the liquid which came out of the wort kettle which was a stage much before the liquid extracted out of malt had acquired the character of alcoholic liquor fit for human consumption. The High Court sought to read down Rule E 35 and directed that on the actual quantity of potable beer manufactured by the respondent allowance of 7 per cent should be given and then duty determined.

At the outset, Mr. Mahendra Anand, learned senior counsel for the appellant submits that the State is not proposing to levy any excise duty on F beer which had not been manufactured and had not become fit for human consumption. He submits that the High Court has not correctly construed the different provisions of the Act and the Rules,

Mr. Anil B. Divan, learned senior counsel for the respondent, has G supported the decision of the High Court and, while drawing our attention to the decisions of this Court in *Mohan Meakin* and *Modi Distillery* (supra), has submitted that in the registers what was entered was the quantity of liquid which was in the worts. At this stage, even the yeast had not been added and it could not be said that what was in the kettle as a wort was potable liquor on which excise duty could be levied. This quantity could not be a measure H for calculating the amount of beer on which excise duty could be levied. He

submitted that excise duty was payable only after all the processes in the manufacture of beer have been completed and on the end-product an exemption of 7 per cent was to be allowed. He drew our attention to the Rules in Karnataka which had contemplated allowance being made with regard to manufacture of potable liquor. In respect of beer, those Rules have stipulated a deduction of 7 per cent at the pre-bottling stage and during the period of fermentation and an allowance of 6 per cent at the stage of filling of beer into the bottles. Mr. Divan, therefore, contended that on the manufactured beer a deduction of 7 per cent was logical.

We agree with the contention of Mr. Divan, and this is also not disputed by Mr. Anand, that the State has jurisdiction to levy excise duty only on beer after it has been brewed and has become fit for human consumption. This is the settled position as laid down by this Court in *Mohan Meakin* and *Modi Distillery* cases. The only question which, to our mind, really arises for consideration is how to determine the quantity of beer which is manufactured on which the excise duty is to be levied. Section 32 gives an answer to this question. The first part of the Section states that subject to the rules which may be made by the financial Commissioner excise duty is to be levied, *inter alia,* on the exciseable article manufactured in or issued from a distillery, brewery or warehouse. A reading of this Section leaves no manner of doubt that the stage at which excise duty can be levied is only after the process of manufacture has been completed and in fact it is to be levied when it is issued from the distillery, brewery or warehouse.

The proviso to Section 32 uses the expression "Provided that duty *may* be levied....." Clause (b) of the proviso states that the calculation of the *beer manufactured* would be according to such scale or equivalents calculated on the quantity of materials used or by the degree of attenuation of the wash or wort. The opening part of clause (b) of the proviso indicates as to how the beer manufactured is to be determined. The proviso is only a manner of computing the end-product with reference to the raw material which has been used in the input. The tax is on the end-product and not on the raw material. What this proviso read with Rule 35., indicates that in order to determine what is the quantity of beer manufactured which is fit for human consumption, after all the processes have been gone through, you see what is the quantity of raw material which has been utilised for the manufacture of beer and in the process of manufacturing give an allowance for wastage of 7 per cent. After doing this, you determine the quantity of beer manufactured. An example which has been given is that a 1000 kgs. of malt should ordinarily yield 6500

litres of beer. By giving an allowance of wastage which must occur during the process of the manufacture of the end-product and limiting that allowance to 7 per cent, the quantity of beer manufactured on which excise duty would be levied would be 6500 litres less 7 per cent.

It appears to us that the proviso to Section 32 read with Rule 35 does nothing more than to give a rough and ready method of calculating the quantum of beer which should have been manufactured in the normal process which is calculated on the basis of the raw material used. The idea, perhaps, is that full quantity of beer which is manufactured is accounted for. It will be seen that registers are maintained by the manufacturer and the figures are taken from there. From the records of the manufacturer, excise authorities will be able to ascertain the quantum of raw material used. It is open to the excise authorities to accept the figure indicated in the records of the manufacturer of the total quantity of beer manufactured. Duty can be levied on this and this would be in consonance with the first part of Section 32. It is, perhaps, only to cross-check whether the figure which is indicated in the books of the manufacturer is correct that a formula can be used for determining the amount of beer which could or should or must have been manufactured. This is by taking into account the quantity of raw material used, the quantity which is in the process and as entered in the brewing book and from there giving an allowance of 7 per cent for wastage. It appears to us that the allowance of 7 per cent has to be in arriving at the figure of the manufactured beer as loss of quantity during the process of manufacture. It cannot be that on the figure of manufactured beer, arrived at on the basis of the books of the respondent, an allowance of 7 per cent has then to be given. If the figure taken for the purpose of calculating the excise duty is only of the end-product, *viz.*, the beer produced, and not the quantity of raw material used in the manufacture of beer during which loss of some quantity as wastage would have occurred, there cannot be a deduction of any sum or proportion as wastage from the quantity of end-product in order to arrive at that quantity. The excisable product is the quantity of beer produced and not the quantity produced, minus 7 per cent.

The allowance is contained in the proviso to Section 32 read with Rule 35. If the entries in the brewing book of the licensee or in the survey book B-6 of the Inspector are not to be taken into consideration, then the question of giving an allowance of 7 per cent contemplated by Rule 35 would also not arise.

It appears to us that resorting to Rule 35 and calculating the quantity

of beer which is manufactured and is fit for human consumption cannot be said to be invalid or impermissible. As we have already indicated, the said Rule only helps in determining what should be the quantity of beer actually manufacture, after all the processes have been undertaken.

In the instant case, it is contended by the learned counsel for the respondent that the figures which are given and entered in the brewing book pertain to the worts which means the liquor obtained by the exhaustion of malt or grain but to which no yeast had been added and, therefore, had not become alcoholic liquor fit for human consumption. This figure, it was submitted, should not have been taken into account. If this be so, then the excise authorities had to calculate and determine the exact quantity of beer manufactured by the respondent and then levy excise duty thereon. On the figures so determined, Rule 35 being inapplicable as contended by the respondent, the question of giving any allowance of 7 per cent for wastage would not arise. What follows from the above is that the excise authorities can levy excise duty only on the beer after it has been manufactured: the levy has to be on the quantity manufactured. How this quantity is to be arrived at has to be determined according to Section 32 read with Rule 35.

We may, however, note that before the Excise Commissioner no dispute appears to have been raised with regard to the figures and the contention was that the percentage of wastage should have been more than 7 or 10 per cent. Mr. Divan, however, submits that this contention which was upheld by the High Court was raised subsequently. While in the body of the writ petition, it is stated that Rule 35 is violative of the Act, no specific prayer was made in the writ petition, but in the manner in which we have interpreted Rule 35 it appears to us that it is only an enabling provision which will help the excise authorities in calculating what would be the quantity of beer manufactured and fit for human consumption on which excise duty could be imposed. The said Rule is neither invalid nor does it require to be read down.

We, accordingly, allow this appeal and set aside the decision of the High Court, but remand the case to the Financial Commissioner for a fresh decision in accordance with law and in the light of the observations made in this judgment.

S.V.K. Appeal allowed.