REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No. 5020 OF 2005

M/S K.C.P. LTD. … APPELLANT

VERSUS

GOVERNMENT OF A.P. & ORS … RESPONDENTS

WITH

CIVIL APPEAL NOS.5021-5022 OF 2005

J U D G M E N T

VIKRAMAJIT SEN,J.

1 The Appellants before us assail the impugned Judgment of the High Court of Andhra Pradesh, which had upheld the legality of Andhra Pradesh Rectified Spirits Rules, 1971 (1971 Rules for brevity) and had found the requirement of obtaining a licence and the payment of Excise duty and Pass fee for exporting rectified spirit to be legal.

2 The Appellants have distilleries which produce various grades of industrial alcohol from molasses, also known as ethyl alcohol or ethanol. In exercise of powers conferred under Section 72 of the Andhra Pradesh Excise

Act, 1968, the Respondent State enacted the 1971 Rules. Rules 4, 13 and 15 are laid out herein for the facility of reference; although in these Appeals it is Rule 15 which is in focus --

> **Rule 4:** Rectified spirit shall not be issued from a distillery or a warehouse without pre-payment of **administrative fee** meant for industrial purposes. In case of potable purposes, rectified spirit shall not be issued from a distillery or a warehouse without pre-payment of Excise Duty except when rectified spirit is moved in bound or when payment of Excise Duty has been exempted.
>
> **Rule 13:** (1) No person shall be granted license for possession and use of rectified spirit for industrial purposes unless the applicant:
> (a) deposits as **security** for the fulfillment of all the conditions of his license such sum as may be fixed by the Government from time to time which shall not be less than Rs. 15,000 in cash in the Government treasury; and
> (b) executes an agreement in Form R.S.-V for payment of the costs, charges and expenses including salaries and allowances of such Excise staff as may be determined by the Commissioner or his nominee to be posted at the manufactory of the licensee in connection with the supervision to ensure compliance with the provisions of the Act, the rules and terms of the license. The staff shall be under the supervision and control of the Commissioner or the Authorised Officer.
>
> **Rule 15:** (1) No rectified spirit shall be exported save under an export permit and in accordance with these rules.
> (2) Any person manufacturing or possessing rectified spirit desires to export (herein-after referred to as the exporter) it for the purpose of its exportation to any area outside the State, shall apply in Form ARS-V to the Commissioner for export permit in that behalf. No such application shall be entertained unless rectified spirit is in surplus in the State. The application shall be accompanied by an import permit, or a no objection certificate or an import license issued by a competent authority of the place to which the rectified spirit is to be exported.
> (3) (i) on receipt of the application for permit to export, the Commissioner shall make such enquiry as he considers necessary and may grant in accordance with these rules as export permit, on

> payment of the **export permit fee** of Rupees Ten per bulk litre in Form R.S. VII in triplicate.
>
> (ii) Such permit shall not be granted unless an Indemnity Bond shall be submitted by the Exporter total quantity of Proof litres permitted to export, binding himself severally to pay the **full duty** at Rs. 15-40 per Proof litre on all losses, by way of drainage, short delivery, non-delivery of rectified spirit or otherwise over and above the admissible loss limit of 0.5% towards transit wastage with interest on all losses in transit.

3 The Appellants before the High Court contended that they had previously supplied to the Government a major portion of the rectified spirit which they had produced, which was thereafter used by the latter as raw material for manufacturing potable alcohol and Indian Made Foreign Liquor (IMFL). As a consequence of the imposition of prohibition, this demand within the State of Andhra Pradesh was drastically reduced; and the Appellants were left with no alternative but to export the said rectified spirit to other States. However, due to the higher power tariffs, licence fees, duties, etc. in Andhra Pradesh, the Appellants could not compete with the prices of rectified spirit produced in some of the other States, further leaving them with no alternative but to explore the possibility of exporting their said product to other countries. In this factual matrix, the Appellants filed writ petitions before the High Court with the following prayer:

> "For the reasons stated above it is prayed that this Hon'ble Court may be pleased to issue a writ or order or direction declaring the A.P.R.S. Rules, 1971 in so far as they pertain to Rectified Spirit (Industrial Grade) as illegal, ultra vires the Constitution, null and void; (2) declare the action of the respondents in insisting upon the petitioner to obtain licence, pay excise duty and pass fee for exporting Rectified

> Spirit (Industrial Grade) as illegal, ultra vires, unconstitutional and violative of the petitioner rights guaranteed under Art. 14, 19(1)(g), 265 and 301 of the Constitution of India and consequently issue a writ of Mandamus directing the respondents not to interfere with the export of R.S. by the petitioners and pass such order or orders as this Hon'ble Court deems fit and proper."

The major premise of the Appellants is that rectified spirit/industrial alcohol is outside the purview of the Excise Act; that the State can only legislate with regard to alcohol which is fit for human consumption; and that since rectified spirit is not potable, it is only the Union Government, which is competent to legislate this activity.

4 The High Court, upon a detailed examination of the existing case law, found that the State cannot charge Excise duty on alcohol that is not fit for human consumption but it is entitled to charge a fee on a *quid pro quo* basis in case it renders any monitoring service. Upon considering **Synthetics & Chemicals Limited** vs. State of U.P. (1990) 1 SCC 109, the High Court held that where rectified spirit is removed or cleared for industrial purposes, the levy of Excise duty and all other controls are to be with the Union, but where the use of rectified spirit is intended for the manufacture of potable alcohol, State Governments are competent to impose any levies. This calls for joint control, supervision and monitoring over the process of manufacture, use and disposal of rectified alcohol, which was in fact being carried out by the Excise Department of the State Government. It was thus well within the powers of the State Government to impose a fee to cover its expenses. The High Court noted that

adding water to rectified spirit would make it fit for human consumption, so the responsibility on the State was tremendous and onerous even with regard to liquor meant for industrial purposes. The State Government was held to be entitled to post its staff at distilleries and to levy a reasonable regulatory fee to defray the expenses of such staff. No data was laid down by either party based on which the Court could come to a conclusion on whether the fee levied was reasonable or not. It was held that the amount levied from the Appellants was in the nature of a fee for services rendered, and not by way of tax. The writ petitions were therefore dismissed.

5 The Appellants have now filed these Appeals before us, challenging once again the Constitutional validity of the 1971 Rules insofar as they are applicable to industrial alcohol, and in the alternative, contending that the fee charged does not satisfy the test of *quid pro quo*. We have contemporaneously considered the circumstances in which administrative and service charges can be recovered by a State Government along with the relevant case law in detail in our Judgment of even date in the Appeal titled as State of Tamil Nadu vs. Tvl. South Indian Sugar Mills, and shall therefore not repeat our reasoning herein in interest of avoiding prolixity. We merely reiterate that while State Governments are not competent to impose taxes/levies on industrial alcohol, fee charged for services rendered to prevent the diversion and conversion of industrial alcohol for human consumption is permissible and legal; such fee need not be charged

strictly on *quid pro quo* basis and it will pass legal muster so long as it is not excessive. We therefore find that the 1971 Rules themselves are not illegal, but rather are well within the purview of the Constitutional powers of the State Government. Rules such as the administrative fee postulated in Rule 4 (supra) are essential to defray expenses incurred by State Governments to prevent the illegal conversion of industrial alcohol to potable alcohol. The quantum of fee levied has not been challenged either before us or before the High Court and no empirical evidence in this regard is available in the Appeal records. We shall accordingly desist from commenting on whether the various heads of fee are excessive, thereby metamorphosing them from a fee to a tax. The fact that the export permit fee was reduced from Rs. 10 to Rs. 3 and finally to Re. 1 per bulk litre indicates that there has been due application of mind by the Respondent State in deciding the quantum of fee.

6 In deciding the *vires* of Rule 15, the discussion must consider the distinguishing features between a fee and a tax. An analysis of the Judgments of this Court will reveal that, *inter alia*, a tax is levied as part of a common exaction, whereas a fee is payment towards services rendered. Thus a "fee" ostensibly collected to prevent nefarious activities such as smuggling and countryside brewing, which have no causal connection with the production of industrial alcohol, would thus metamorphose into a tax. It appears to us that that the State Government has not undertaken any supervisory activity which

would constitute a *quid pro quo* for the imposition of the "export permit fee" charged under Rule 15(3)(i). Any expenses incurred on such supervisory or administrative activity has perforce already been recovered or reimbursed from fees on account of storage or sale transactions on industrial alcohol. These dues paid by the Appellants are channelled towards preventing the illegal activities of unrelated third parties for which the Appellants are in no way responsible. It is evident that the intention behind this "fee" is to prevent manufacturers from exporting industrial alcohol to breweries of potable alcohol in other States that would fetch them a better price than producers of other products within their own State. It is thus clearly, in reality, a tax. Rule 15(2), which holds that export will only be allowed if there is a surplus in the State evidences the apprehension of the State Government that it may run short of industrial alcohol. This sub-Rule, as well others such as Rule 15(1) which imposes the requirement of an export permit and Rule 15(3)(ii) which adds the requirement of an indemnity bond, are also outside the jurisdiction and powers of State Governments, as their purpose is clearly not to prevent industrial alcohol from being diverted and converted to potable alcohol; their purpose is to regulate, control and discourage the export of industrial alcohol. The imposition of a tax to regulate export under its own head is entirely feasible, if introduced by the competent authority, i.e. the Union Government as held in **Synthetics & Chemicals Limited**. However, this is not the scenario before us, both for the want of *vires* and for the ambiguity behind the intention of this Rule. The Respondent State has given no

explanation to justify this Rule, and has not shown any service rendered in return.

7 We uphold the 1971 Rules and find that the Respondent State had the power to enact these Rules. However, we strike down Rule 15 dealing with the export of rectified spirit, finding that it imposes a tax, not a fee, on the Appellants and is outside the Respondent State's legislative competence. It has not been conclusively shown by the Respondent State that it has been constrained to monitor or superintend that industrial alcohol is not illegally diverted to other uses within the State. If industrial alcohol is exported outside the State as industrial alcohol, these impositions partake of a totally different character, transferring it into a tax. These Appeals are disposed of in these terms.

.....

...J. **[VIKRAMAJIT SEN]**

.....J.
[SHIVA KIRTI SINGH]

New Delhi;
August 12, 2015.