2022 INSC 13

(Corrected)

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 169-170 of 2022
(Arising out of SLP(C) Nos. 11596-11597 of 2020)

STATE OF UP
THROUGH SECRETARY (EXCISE) & ORS. ….APPELLANT(S)

VERSUS

M/S MCDOWELL AND COMPANY LIMITED ….RESPONDENT(S)

JUDGMENT

Dinesh Maheshwari, J.

Contents

Preliminary and brief outline

Leave granted.

2. By way of these appeals, the State of Uttar Pradesh and its officers related with the Excise Department as also the District Magistrate, Shahjahanpur have essentially questioned the order dated 10.04.2017 in Misc. Bench No. 4493 of 2006, whereby the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow[1] quashed the demand raised against the writ petitioner company (respondent herein) towards loss of excise revenue because of destruction of liquor in fire. The appellants have also questioned the order dated 06.11.2019 in C.M. Application No. 90936 of 2019, whereby the High Court directed the appellant No. 2 (Excise Commissioner, Uttar Pradesh[2]) to expeditiously take a final decision on the

1 Hereinafter also referred to as 'the High Court'.
2 Hereinafter also referred to as 'the Excise Commissioner'.

application for refund of the amount that was deposited by the writ petitioner pursuant to the interim order passed in the said writ petition.

3. Before dilating on the issues raised in this case, we may draw a brief outline of the matter to indicate the contours of forthcoming discussion.

3.1. The genesis of the present litigation had been in a fire incident that took place in a godown of the distillery of the respondent company on 10.04.2003. As many as 35,642 cases of Indian Made Foreign Liquor[3] of different brands got destroyed in this fire. After receiving the initial reports that the fire possibly took place due to short circuit of electricity, the department proposed to recover the amount of excise duty lost, due to such destruction of liquor, from the respondent company. The respondent maintained that there was no negligence on its part and, therefore, no case for recovery of the alleged loss of excise duty was made out under Rule 7(11) of the Uttar Pradesh Bottling of Foreign Liquor Rules, 1969[4] and Rule 709 of the Uttar Pradesh Excise Manual[5].

3.2. However, the Excise Commissioner, by his order dated 11.07.2006, rejected the submissions of the respondent and raised a demand to the tune of Rs. 6,39,32,449.44 towards loss of excise revenue on account of destruction of liquor. Accordingly, the District Magistrate, Shahjahanpur asked the respondent to deposit the amount within one week.

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3 'IMFL' for short
4 Hereinafter also referred to as 'the Rules of 1969'.
5 Hereinafter also referred to as 'the Excise Manual'.

3.3. Assailing the demand and recovery steps aforesaid, the respondent-company preferred a writ petition[6] wherein, the High Court, by way of an interim order dated 25.07.2006, stayed the recovery proceedings, subject to the respondent company (writ petitioner) depositing an amount of Rs. 3 crores. A petition seeking special leave to appeal against this interim order was rejected by this Court on 14.08.2006. Thereafter, on 21.08.2006, the respondent company deposited the said amount of Rs. 3 crores with the District Magistrate, Shahjahanpur.

3.4. The writ petition so filed by the respondent company was allowed by the High Court in its impugned order dated 10.04.2017, essentially with findings that Rule 7(11)(a) of the Rules of 1969 was not applicable in the matter because there was no wastage in handling operations of bottling and storage of IMFL; that Rule 709 of the Excise Manual was attracted for which negligence was required to be shown; that the order passed by the Excise Commissioner was based on conjectures and without any cogent evidence about negligence on the part of the writ petitioner; and that the '*incident was nothing but an act of God*. The High Court, accordingly, set aside the impugned orders of demand and recovery towards the alleged loss of excise revenue. Thereafter, for the department having failed to refund the amount deposited pursuant to the interim order in the writ petition, the respondent company moved an application before the High Court whereupon, by the order dated 06.11.2019, the High Court directed

6 Misc. Bench No. 4493 of 2006

the Excise Commissioner to take a decision on the application for refund within four weeks.

3.5. As noticed, the aforesaid orders dated 10.04.2017 and 06.11.2019 passed by the High Court are questioned in these appeals. The appellants maintain that the High Court was not justified in its findings that the incident in question was an act of God and not that of negligence on the part of the respondent. The appellants rely upon Rule 7(11)(a) of the Rules of 1969 and Rules 708 and 709 of the Excise Manual to contend that the respondent company is absolutely liable to pay the excise duty payable on the stock of IMFL destroyed in fire. An ancillary aspect relating to the effect of insurance coverage, only of the value of liquor, and receiving of insurance claim by the respondent company have also been raised. *Per contra*, it submitted that the claim of excise duty in the present case cannot be enforced, for being not authorised by law; and that the respondent is not liable to pay excise duty on the IMFL destroyed in fire, particularly when there was no negligence on its part.

4. The foregoing outline would indicate that the focal point in this case is, as to whether the appellants are entitled to levy, and correspondingly, the respondent is liable to pay, the excise duty on the liquor destroyed in fire? As regards this focal point, three principal questions would require determination, as noticed *infra*.

Relevant factual aspects and background: The fire incident and demand of excise duty on the liquor destroyed

5. Having regard to the questions involved, we may briefly take note of the relevant factual and background aspects, particularly those relating to the functioning of the respondent company and setup of the distillery and godown in question as also the fire incident and the demand of excise duty, leading to the present litigation.

Before the fire

6. The respondent company had been engaged in the business of distillation, bottling and vending of different brands of IMFL. For the purpose of these activities, the respondent was granted license in Form PD-2 to establish and run a distillery for distillation and manufacture of potable alcohol at Distillery Unit Rosa, Shahjahanpur; and was also granted license for wholesale vend of IMFL in Form FL-3 and FL-3A under the Rules of 1969. The respondent company had been functioning at the licensed premises since the year 1994.

7. We need not elaborate on various features of the processes of distillation, bottling and storage but, a few facts placed on record by the parties, relating to the electrical installations and firefighting measures in the premises in question could be usefully noticed.

7.1. On 19.09.2002, the Assistant Electricity Inspector, Government of Uttar Pradesh, Shahjahanpur Zone, Shahjahanpur, after having conducted

a periodical inspection of the said premises of the respondent company, made the following observations pertaining to the electrical installations: -

> "(a) Except the endorsement made herein the relevant rules of Indian Electricity Rules, 1956 was being complied with.
> (b) The details mentioned in the subsequent page are not according to Indian Electricity Rules, 1956
> Hence, in the interest of Safety, you are requested that you should rectify the deficiency by engaging any of the authorized electrician and sent a report within one month after compliance in accordance with the Indian Electricity Rules,1956.
> xxx xxx xxx
>
> Rule 35: It is found that CAUTION place is not placed at certain prominent places. The same should be placed/installed.
> Rule 61(2): At one point of Turbine's Distribution Board Panel, earth wiring has been done with a thin wire. Hence the same should be removed and strip earthing should be done."

(underlining supplied)

In response to the aforesaid, the respondent company stated, in its letter dated 23.09.2002, that the work pointed out in the report had been completed.

7.2. Apart from the above, it appears that certain modification/upgradation work was undertaken at the production plant in the distillery and in that regard, the Excise Inspector, Production Section, Rosa Distillery, Shahjahanpur, in his letter dated 26.12.2002, advised the respondent that electrical and gas wielding jobs be performed carefully with full safety, while ensuring standard methods of fire safety and the required firefighting devices. The said Excise Inspector cautioned the respondent that *"You will be responsible for any loss of revenue/other loss if that occurs due to your carelessness."*

7.3. On 01.03.2003, the office of Fire Brigade Officer, Shahjahanpur issued a No Objection Certificate of Fire Fighting Department for the period between 06.02.2003 to 30.09.2003 after carrying out inspection of the premises in question. In this inspection, the Fire Brigade Officer took note of the fact that different types of fire extinguishers and other firefighting instruments were at the right place and were in working condition, which were refilled by the Chief Engineer of the respondent company. However, a direction was given with regard to the refilling and testing of the instruments; and Foam Installation was also suggested for better firefighting arrangements in the following terms: -

> "You are directed that, in future Fire Fighting Instruments (Fire Extinguisher) should be tested in Fire Station Shahjahanpur before refilling. It is also suggested that, for better management of fire fighting arrangements, Foam Installation should be done in Distillation Plant. With this suggestion, NO objection Certificate of Fire Fighting Department is granted for a period between 06.02.2003 to 30.09.2003, because the said firm has deposited the Testing Fee to the Fire Brigade Department on 06.02.2003."

The fire incident and relevant reports

8. The aforesaid had been the position of record in relation to the electrical installations and firefighting measures in the premises in question. However, on 10.04.2003, a fire incident did take place in a godown of the respondent company, which resulted in 35,642 cases of manufactured IMFL getting destroyed.

8.1. It has been the case of the respondent company that the godown in question was locked for lunch at 12:00 noon on 10.04.2003 under joint lock and key of the Excise Inspector in-charge of the distillery and the

company's representative and at that time, nothing objectionable was noticed and the stocks were in safe condition. However, at about 12:55 p.m., smoke was noticed emitting from the godown. Thereupon, the Excise Inspector in-charge of the distillery was immediately informed and the joint locks were opened; and it was noticed that the stocks of IMFL were on fire. The information about this fire was given to the Police Department and also to the Fire Department and other Excise Authorities. As per the averments and the material on record, it appears that the firefighters could bring the fire under control only by 5:00 a.m. on 11.04.2003.

9. It is borne out that upon receiving information about the incident in question, the Deputy Excise Commissioner, Bareilly, reached the distillery at about 06:30 p.m. on 10.04.2003 and carried out spot inspection with other officers of the department and the Manager Personnel of the respondent company. In his initial report drawn on spot inspection, the said Deputy Excise Commissioner took note of the efforts being made for controlling and dousing the fire as also damage to a substantial quantity of liquor; and also indicated that upon enquiring about the possible reasons of this fire, he was informed that the same took place, probably, due to short circuit in the electricity supply. According to the appellants, even the Station House Officer concerned opined in his investigation report dated 11.04.2003 that the reason for fire was short circuit of electricity.

10. On 13.04.2003, the Fire Brigade Officer of Uttar Pradesh Fire Service also drew up the report about the incident and the efforts made for

controlling the fire. He, however, indicated that the reason of fire was unknown. The relevant part of this report, counter signed by the Deputy Superintendent of Police, as placed on record by the respondent, reads as under: -

> "ON receiving information about Fire, Fire Service Unit rushed to the Place of Incident. On arriving, it was seen that the front part of Godown of Indian Made Foreign Liquor was burning in fire badly, which is situated in Rosa Kothi, M/s Mcdowell Company Ltd. Thana-R.___ , District- Shahjahanpur, and fire was in a horrible, which was being doused by the Staff of M/s Mcdowell & Company Ltd. with the help of available instrument but the fire was out of control for them. After seeing the horrible condition of fire, immediately started the work to control fire by laying two lines in one motor fire engine, immediately thereafter second motor fire engine was brought from Kasba- Tilhar. In dousing the Fire other unit Oswal Chemical Fertilizer and O.C.F. also helped, and after enough hard work, process of dousing was started and after putting the life at risk and after several hours, fire was doused/controlled. On investigation/inspection of fire, it was found that, due to fire, Liquor kept in Go-down was destroyed. Hence, in this fire after adding building and Liquor, in total, according to station officer, approximately a damage worth Rs. 2 crore has been assessed and Rs. 1 crore value of property was saved. Reason of fire was unknown.
>
> Therefore, after finishing the entire work, the fire Service unit returned to the Fire Station after giving instructions that in case again the Fire shows up again, the Fire Station should be informed immediately. We came back to the Fire Station."
>
> (underlining supplied)

11. Another report dated 02.08.2003 was submitted by the Assistant Excise Commissioner, Rosa Distillery, Shahjahanpur to the Excise Commissioner, detailing out the statements of stock of liquor saved as also the stock destroyed in fire and his comments on the cause of fire. The relevant part of this report could be usefully extracted as under: -

"(f) **Cause of Fire :** A detailed enquiry and Investigation was done by me in the distillery after the fire incident. All the Officers mentioned in para (d) have also made inquiries and investigated the matter in detail. All the Investigating Officers have also reached to the conclusion that undisputedly the cause of fire was unknown. During my Investigation and calculation work also, no fact or evidence came to my knowledge, which indicates that there was any negligence either on the part of Distiller or on the part of Excise Staff deputed in the Distillery. It also does not appear that the said incident was deliberately done by any of them. In fact, the Distiller and the Excise Staff have worked jointly with great efficiency and hard work during and after the fire Incident. Thereby ---- stock was saved from the damaged stock.

This fact was confirmed by, Joint Excise Commissioner Investigation dated 30.04.2003, Deputy Excise Commissioner, Bareilly Incharge, Bareilly , investigation dated 10.04.03, Fire Brigade Officer, Investigation report dated 13.04.03 and Station House Officer's Final Report dated 11.04.03, also with copies annexed. In the report of Station House Officer reason of incident is possibly due to short circuit in Electricity. I had also seen the burned cable in debris, but in my opinion Nothing can be confirmed. It can be such an incident, in which reason is Unknown.

On the Distiller level, in the month of December, Instrument according to Fire safety standard, were installed and safety orders were ordered in respect of Letter No. 39/ dated 26.12.02 by the distillery Fire Brigade Officer, Shahjahanpur; Letter No. Memo/F.S./ date 1.03.03, and received the certificate regarding the Instrument in good condition. The Distillery also produced certificate by U.P. Electricity Department, regarding Electricity cabel Establishment.

In accordance, with letter sent by me dated 14.04.03 and 21.04.03 in view of the aforementioned points before the Fire Incident, during the Fire Incident and after that, the calculation of the damaged stock and possible reason of Fire incident was discussed."

(underlining supplied)

Demand of excise duty on the liquor lost in fire

12. In view of the fact that a substantial quantity of the stored liquor got destroyed in the fire and that had the consequence, *inter alia,* of loss of excise revenue, the Excise Department proposed to recover this loss from the respondent company.

12.1. In the first place, on 24.09.2003, a show-cause notice No. 463/CAA/Rosa Distillery/Shahjahanpur was issued by Assistant Excise Commissioner, Rosa distillery to the respondent company seeking explanation regarding the recovery of excise duty in view of Rule 7(11) of the Rules of 1969, as the respondent allegedly failed in its responsibility to keep the stock of liquor safe and secure. In its response letter dated 01.10.2003, the respondent company stated that there was no negligence on its part in regard to the said fire incident; that Rule 7(11) of Rules of 1969 was of no application; and that Rule 709 of the Excise Manual would apply only in case of negligence, which was not proved.

12.2. The Excise Commissioner, however, proposed to recover excise duty from the respondent company and sent a letter dated 27.11.2003 to the Principal Secretary to the Government seeking directions. The said Principal Secretary, in his response letter dated 17.02.2004, stated that the provision regarding imposition of excise duty on the stock of IMFL destroyed in fire was laid down in Rule 709 of the Excise Manual and on the basis thereof, the Excise Commissioner was competent enough to proceed. The Principal Secretary, *inter alia*, stated as under: -

> "Please refer to your letter No. G-43/9-alcohol/Rosa- Fire incident dated 27th November, 2003 regarding directions to be given to the District Magistrate Shahjahanpur with regard to imposition of excise duty on the stock of IMFL destroyed in fire incident dated 10.04.2003 at M/s McDowell & Co. Ltd., Rosa, Shahjahanpur.
>
> 1. In this Connection I have been advised to ask you that the provision regarding imposition of excise duty involved in the stock of IMFL destroyed in the above fire incident at McDowell & Co Ltd., Rosa Shahjahanpur on 10.04.2003 is laid down in

> rule 709 of Excise Manual, on the basis of which you are competent enough to proceed in the matter.
> 2. Your proposal regarding levy of excise duty on the stock of IMFL destroyed in the above fire incident is in Order. Please take necessary steps at the earliest and inform the same to the Government within 15 days."

12.3. Proceeding on the letter so received from the Principal Secretary, the Excise Commissioner, on 23.02.2004, asked the District Magistrate to quantify the excise duty leviable under Rule 7(11) of the Rules of 1969. Having noticed such steps on the part of the authorities, the respondent company remonstrated in its letter dated 08.06.2004 addressed to the Excise Commissioner and requested that the competent authority must first determine as to whether excise duty could at all be levied on IMFL destroyed due to fire before the point of issue of liquor for sale was reached. It was also submitted that the directions may be given only to proceed in terms of Rule 709 of the Excise Manual and not Rule 7(11) of the Rules of 1969. The Excise Commissioner, in his letter dated 12.05.2005, sought a point-wise reply from the respondent company and this letter was replied on 16.05.2005, wherein the respondent company maintained that fire incident was due to the reasons beyond human control and there was no negligence on the part of the company.

12.4. Yet further, the respondent company stated in its letter dated 05.06.2005 that they had a certificate issued by Fire Department, valid up to 03.09.2003; that appropriate fire protection equipments were installed; that electricity safety certificate was also given on 19.09.2002; that MCBs were installed; that there was no material to show that it was an accident

due to negligence on part of the company; and that there was no compulsion to get insurance with respect to excise duty. The aforesaid reply was forwarded by the Excise Commissioner to the Principal Secretary, Excise with his letter dated 29.06.2005. Thereafter, the State Government, in its letter dated 27.12.2005, observed that excise duty on the rates prevailing should be imposed on the respondent company in the interest of revenue.

13. The aforesaid exchange of communications culminated in the impugned order dated 11.07.2006 by the Excise Commissioner, seeking to recover a sum of Rs. 6,39,32,449.44 from the respondent company towards the loss of excise revenue. The Excise Commissioner, *inter alia*, relied upon the inspection reports and held that the respondent was responsible for the safety of the alcohol but failed to ensure such safety; had been careless in not providing fire-proof electric equipments of good quality; and had taken insurance of liquor but not of excise duty. This order dated 11.07.2006, being the bone of contention in the present matter, could be reproduced *in extenso* as under:

> "OFFICE OF EXCISE COMMISSIONER, UTTAR PRADESH, ALLAHABAD
>
> No. 7244/9-Alcohol/131/Rosa/Fire Incident Allahabad Dated – 11.07.2006
>
> **ORDER**
>
> M/s McDowell & Company Ltd., Rosa, District Shahjhanpur is a PD-2 Licensed distillery. The abovementioned distillery has been granted FL-3 and FL 3A license under the Uttar Pradesh Bottling of Foreign Liquor Rules, 1969 and has been doing the bottling of Indian Made Foreign Liquor of their brand and brand of Harbartsons

Ltd. respectively. On 10.04.2003, due to fire incident in the FL-3 and FL3A godown of the distillery, 35,642 (Thirty five thousand six hundred forty two) cases of Indian Made Foreign Liquor of different brands got destroyed. During investigation, it is revealed that the McDowell and company ltd. had taken the insurance of the Indian Made Foreign Liquor kept in the sealed godown. The distillery has also received the claim for that. A Show cause Notice no. 463/CAA/Rosa Distillery/Shahjahanpur dated 24.09.2003 was given to the M/s. McDowell and Company ltd. in relation to the burning of the alcohol kept in the sealed godown. It has been stated by the M/s Mcdowell and Company Ltd. in its explanation dated 01.10.2003 to the abovementioned Show Cause Notice that the fire incident is an act of god and they have no control over this. On 10.04.2003, during the spot inspection conducted by Deputy Excise Commissioner Bareilly, Manager Personnel Shri Anurag Dhawan who was present has stated that possibly fire took place due to short circuit in the electricity supply. The Station officer Shri Ram Chandra Mishan, District Shahjahanpur has stated in his investigation report dated 11.04.2003 that the reason for fire is the short circuit of electricity. The inspection of the M/s McDowell and Company Ltd. was conducted by Joint Excise Commissioner (Task Force) and Deputy Excise Commissioner (Law). It has been found in the inspection that the godown is very old and its repair has also not been done. It is also necessary to mention that M/s Mcdowell and Company Ltd. in the distillery from the time of British period and the distillery & sealed godown has been running in the old building. The roof of the godown was made of asbestos sheet. The short circuit can take place due to old electric wiring in the godown.

In this relation District Officer, Shahjahanpur vide his letter no. 689/OSD/Camp/2004 dated 01.04.2004 has requested for guidance/instruction on the incident. The Excise Commissioner, Uttar Pradesh, vide his letter no. G-43/9-alcohol/Rosa fire incident dated 17.11.2003 has referred this incident to the government in which the government vide letter no. 3763 E-2/13-03 dated 17.02.2004 has directed that the excise duty may be charged on the class of alcohol prevalent at that time on the class of alcohol destroyed and it was also directed that Excise Commissioner is capable to act in this incident.

In perspective to the direction made by Government, the case is that the M/s Mcdowell and Company Ltd., Rosa Shahjhanpur had taken license of FL-3 and FL 3A under UP Bottling of Foreign Liquor Rules, 1969. According to Rule 7 (11) (a) of the abovementioned rules, the licensee is liable to pay excise duty on the wastage of more than 1%. It was responsibility of the license holder to take remedy /precautions for the safety of the alcohol kept in the godown but proper safety of the alcohol kept in the godown was not taken up. The licensee had taken the insurance of the price of alcohol, bottle, label, etc. but insurance of the excise duty imposed on the alcohol was not done. In this way, the licensee has secured his

value of alcohol. The licensee has not suffered any loss in this incident and whatever loss has taken place has been recovered from the insurance. Therefore, perhaps the licensee was careless regarding the electric equipments. The licensee was aware about the terms and conditions while taking license that he is to pay the excise duty on the wastage of stocked alcohol greater than 1 % of the quantity. Inspite of having knowledge, the licensee has not arranged the fire proof electric equipments of good quality due to which questioned incident has taken place. The carelessness taken by the distiller in the safety of the stock of alcohol cannot be considered as Act of God. The license is granted to him under the UP Bottling of Foreign Liquor Rules, 1969. There is provision of charging excise duty on the wastage more than 1 % under Rule 7(11) (a) of those Rules. The Licensee cannot deny the conditions of the license. It has been clearly stated by the Constitution Bench of the Hon'ble Supreme Court in judgment Har Shankar and Anr. Vs. Deputy Excise and Taxation Commissioner and Anr. (1997) 1 SCC 737 that the licensee has taken the license after carefully reading the questioned rules of 1969 and now he cannot wriggle out from the conditions of the license. The licensee has received the license after reading the Uttar Pradesh Bottling of Foreign Liquor Rules 1969 with open eyes, therefore he cannot wriggle out to follow the Rules.

It has been mentioned in Khode Distilleries Ltd. and Ors. vs. State of Karnataka and Ors. (1975) SCC 576 at point (h) "The State can adopt any mode of selling the licences for trade or business with a view to maximize its revenue so long as the method adopted is not discriminatory".

It is clear from the Rule 7(11)(a) of UP Bottling of Foreign Liquor Rules, 1969 are made to secure the revenue. The State has special privilege on manufacturing of liquor, custody, transport, import - export. The State in public interest to increase the revenue strictly monitor the business of alcohol so that neither it can be misused and nor it can cause loss of revenue to be received from it. In respect to the abovementioned according to Rule 7(11)(a) of UP Bottling of Foreign Liquor Rules, 1969, the excise duty of Rs. 6,39,32,449.44/- (Rupees Six Crore Thirty Nine Lakh Thirty Two Thousand Four Hundred Forty Nine and Forty Four Paise Only) is leviable on M/s Mcdowell and Company Ltd., Rosa, district Shahjahanpur as per prevalent rate at the time of incident for year 2003-2004 on different brands of alcohol.

Gejendra Pal
Excise Commissioner
Uttar Pradesh."
(underlining supplied)

13.1 Pursuant to the order so passed by the Excise Commissioner, District Magistrate, Shahjahanpur commenced recovery proceedings and directed the respondent company to deposit the aforesaid sum of Rs. 6,39,32,449.44 within one week.

Writ petition in the High Court and interim order therein

14. Aggrieved by the demand so raised by the Excise Commissioner and the recovery proceedings so adopted by the District Magistrate, the respondent company filed the writ petition, being Misc. Bench No. 4493 of 2006, before the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, with the following prayers: -

> "i. Issue, a writ order, or direction in the nature of Certiorari calling for the records and quashing the impugned order dated 11th July, 2006 passed by the Excise Commissioner, U.P. and letter dated 17th July, 2006 of the District Magistrate Shahajahanpur, U.P. demanding Rupees 6,39,32,449.44.
>
> ii. Issue, a writ order, or direction in the nature of mandamus commanding the respondents not to recover any amount from the petitioner towards the alleged demand with regards to the quantity of Indian Made Foreign Liquor destroyed due to fire accident at Shahjhanpur on 10th April, 2003.
>
> iii. Issue a writ/order or directions in the nature of mandamus declaring Rule 7 (11) of the UP Bottling of Indian Made Foreign Liquor Rules, 1969 as null and void and ultra vires of the UP Excise Act.
>
> iv. Issue a writ/order or directions in the nature of Certiorari calling for the records and quashing the Impugned Order of the State Government which was conveyed through letter dated 17.02.2004 of the Principal Secretary (Excise), Government of UP to Excise Commissioner."

14.1. In the said writ petition, an interim order was passed by the High Court on 25.07.2006 staying the recovery proceedings subject to the

respondent company depositing an amount of Rs. 3 crores with the Excise Commissioner. The respondent company attempted to challenge this interim order dated 25.07.2006 by way of SLP(C) No. 12902 of 2006 but, this Court declined to interfere with the interim order and the special leave petition was dismissed on 14.08.2006. Thereafter, the respondent company deposited the said sum of Rs. 3 crores with the District Magistrate, Shahjahanpur on 21.08.2006. The appellants filed their counter affidavit in the writ petition on 08.09.2006 and the writ petition was finally heard and decided by the High Court by its impugned judgment dated 10.04.2017.

Impugned orders dated 10.04.2017 and 06.11.2019: High Court allowed the writ petition and passed consequential orders

15. The High Court, in its impugned order dated 10.04.2017, after taking note of the aforesaid background aspects as also the Rules of 1969 and the Excise Manual, in the first place noted the fact that though the validity of Rule 7(11) of Rules of 1969 was questioned in the writ petition but while arguing the matter, learned counsel for the company confined his challenge to the impugned orders of recovery of excise duty essentially on the grounds that the company could have been held guilty only if there was any negligence on its part in causing loss of excise revenue but, in the present case, there was no negligence on the part of the company; and that it was an act of God and, therefore, no liability could be imposed on the company. The High Court observed that Rule 7(11)(a) of the Rules of

1969, dealing with wastage, in the operation of bottling and storage of IMFL was of no application because in the present case, there was no wastage in handling operations of bottling and storage but there was loss of spirit due to fire. The High Court pointed out that Rule 709 of the Excise Manual would apply and in that regard, if the company was shown to have caused loss to excise duty on account of any negligence, it would be liable to make good the loss. The High Court, *inter alia,* observed as under: -

> "26. Rule 7(11)(a) of Rules, 1969 talks of wastage which occurred in the operation of bottling & storage of IMFL, but here is not a case where there is any wastage in handling operations of bottling & stor-age of IMFL but there is total loss of spirit due to fire and this in turn has caused loss to excise duty.
>
> 27. In our view, it is Rule, 709 of U.P. Excise Manual which applies and if petitioner can be shown to have caused loss to excise duty on account of any negligence, it is liable to make good the said loss. The condition precedent, therefore, is the factum of "negligence" on the part of petitioner. We have no manner of doubt that in the pre-sent case Rule 7(11)(a) of Rules, 1969 has no application and it is Rule 709 of U.P. Excise Manual which is attracted."

16. The High Court, thereafter, proceeded to analyse the impugned order dated 11.07.2006 and observed that the inferences drawn therein were lacking in material foundation and were only of conjectures and surmises. The High Court found that there was no apparent negligence on the part of the company and also recorded its conclusion that the incident was nothing but an act of God. The High Court further observed that negligence being the condition precedent for the fiscal liability in question, no such liability could be fixed unless negligence was found on the basis of some material; and held that in absence of any material to show that the

loss was caused on account of any negligence on the part of the company, the demand in question was wholly illegal and unsustainable. The High Court proceeded to set aside the demand in question with the following observations and findings: -

> "29. In order to hold petitioner guilty of negligence, ECUP vide impugned order dated 11.7.2006 while admitting that police officials as well as joint inspection report, possible reason has been given as "short circuit" from electrical supply, but having said so, it has further said that (i) godown is very old and has not been properly repaired; (ii) Distillery is of British period, Distillery and Warehouse both are running in old buildings; (iii) roof of godown is made of abestos sheets and there is possibility of short circuit due to old electrical wire in the godown; (iv) Insurance of excise duty was not obtained, though spirit was insured; (v) licensee was probably neg-ligent in maintenance of electrical equipments; (vi) licensee did not insure electrical equipments; (vii) fire proof of electrical equipments were not of good quality, and this resulted in the incident. Therefore, it is not an act of God. When we asked from learned counsel for respondents as to wherefrom respondents got information that fire equipments were not of good quality and have caused incident or that Distillery was negligent in maintenance of electrical equiments, he could not point out any material on record, wherefrom the afore-said inference drawn by ECUP could have been substantiated or to be justified. In fact, the aforesaid inference is nothing but conjec-tures and surmises on part of ECUP without having any material foundation.
>
> 30. On the contrary, various authorities from time to time, who have visited site, have clearly reported that there was no apparent negligence on the part of petitioner. The incident was nothing but an act of God. When a fiscal liability is founded on certain condition precedent, i.e. "negligent" on the part of the person whom we have to hold responsible, then no responsibility can be fixed unless such negligence is shown to be founded on the basis of some material. Factum that building was old or the wirings were old have pointed out to be dangerous or prone to fire either by Electricity Department or Fire Department or even by Excise Authorities, who were In charge of bonded Distillery, storage and godown.
>
> 31. Further, electrical equipments installed at the Distillery were not of good quality is also conjectures and surmises as no material was shown to fortify the same. In absence of any material to show that loss was caused on account of any negligence on the part of petitioner, we find that demand made in this writ petition is wholly illegal and cannot sustain.
>
> 32. The writ petition is accordingly allowed. Impugned orders dated

11.7.2006 and 17.7.2006 are hereby set aside. No costs."

(underlining supplied)

17. After the decision aforesaid, the respondent company sought directions for refund/adjustment of the sum of Rs. 3 crores deposited in compliance of the interim order. The said application, being C.M. No. 90936 of 2019, was considered and allowed by the High Court by its order dated 06.11.2019 requiring the Excise Commissioner to decide the application moved by the company while keeping in view of the fact that the money was deposited pursuant to the interim order and subsequently, the writ petition was allowed.

Rival submissions

18. While assailing the orders passed by the High Court, learned counsel for the appellants has advanced essentially two-fold contentions: one, that it had been clearly a case of negligence on the part of the respondent company where the fire incident cannot be termed as an act of God; and second, that as per the applicable provisions of U.P. Excise Act, 1910[7], the Excise Manual and the Rules of 1969, the demand of excise duty on the liquor lost in fire has rightly been raised. The learned counsel has also addressed the Court on another facet of the case, as regards the effect of insurance claim received by the respondent company towards the cost of IMFL destroyed in fire.

7 Hereinafter also referred to as 'the Act of 1910'.

19. Learned counsel has submitted that an act of God is an inevitable, unpredictable and unreasonably severe event caused by natural forces without any human interference, such as earthquake, lightning, flood etc.; it is a natural hazard outside the human control for which, no person could be held responsible. It is submitted that for the fire in distillery to be an act of God, there must have been some such incident like earthquake or lightning but no such natural forces were in operation at the time of the incident; and this incident cannot be attributed to any such force of nature but only to some human fault. Learned counsel would submit that when operation of natural forces is ruled out and the incident had, in fact, taken place, it would obviously be referred to the elements of negligence on the part of the respondent company. The learned counsel has elaborated on the submissions that negligence is a specific tort and essentially refers to a failure to exercise that care which circumstances demand. To support the contentions that the present one has not been an act of God, learned counsel has referred to and relied upon the decisions in ***Divisional Controller, KSRTC*** **v.** ***Mahadeva Shetty and Ors.*****: (2003) 7 SCC 197,** ***Vohra Sadikbhai Rajakbhai & Ors.*** **v.** ***State of Gujarat and Ors*****: (2016) 12 SCC 1** and ***Patel Roadways Limited*** **v.** ***Birla Yamaha Limited*****: (2000) 4 SCC 91.**

19.1. Learned counsel for the appellants would submit that the incident of fire in the present case, on account of short-circuit in the godown storing large quantity of highly inflammable IMFL, was clearly an incident which

was avoidable, if proper and necessary care was taken by the respondent company. It is submitted that distilleries are even otherwise susceptible to fire due to large amount of alcoholic vapour being in the air and the respondent company was required to take all care and precautions to avoid any such incident. With reference to the inspection reports, learned counsel has contended that even before the incident in question, the defects and deficiencies in electrical installations and wiring had been indicated and when the incident of fire took place due to short-circuit, the company cannot avoid its liability by merely suggesting that they had followed all preventive measures or had taken a certificate from the Fire Department.

20. As regards the entitlement of appellants to demand and recover the excise duty on IMFL lost in fire and corresponding liability of the respondent company to make such payment, learned counsel for the appellants has made elaborate reference to the relevant statutory provisions and has submitted that the demand in question has been squarely in conformity with law and deserves to be upheld.

21. With reference to entries 8 and 51 of List II of the Seventh Schedule to the Constitution of India, learned counsel would submit that the entire field of legislation on the subject relating to intoxicating liquors as also the matters concerning duties of excise and countervailing duties is in the domain of the State legislature; and for the present purpose, the matter is governed by the provisions contained in the Act of 1910, the Excise Manual and the Rules of 1969. With reference to Sections 17, 18, 19, 28, 29 and

30 of the Act of 1910 the learned counsel has submitted that no intoxicant can be manufactured and no liquor can be bottled for sale except under the authority and subject to the terms and conditions of a licence granted in that behalf (Section 17); and, as per Section 18, the Excise Commissioner may grant a licence for establishment of distillery and warehouse in which spirit may be manufactured under a licence granted under Section 17. Further, as per Section 19, no intoxicant can be removed from any distillery, brewery, warehouse or the place of storage, unless duty has been paid or a bond has been executed for payment thereof. It is thus submitted that the condition precedent for removal of any intoxicant is actual payment of the duty payable or execution of bond for such payment. Learned counsel has referred to the bond executed in favour of the Governor of Uttar Pradesh by the respondent for bottling of IMFL and has submitted that the licencee has been under obligation to observe all the provisions of the Act of 1910 and the rules made thereunder.

21.1 The learned counsel would submit that the distillery having been established under PD-2 licence, the respondent was under obligation to follow the terms and conditions of the licence and correspondingly, has always been under obligation to deposit the duty demanded under the provisions of the Act of 1910, particularly when all the operations, including that of transfer of the liquor from PD-2 licensed area to the bottling hall and to the godown and then, dispatch are covered by the terms of licence and the bond executed by the distiller. Yet further, learned counsel would

submit that in terms of Rule 7(11) (a) of the Rules of 1969, the respondent company was responsible for payment of duty on wastage in excess of 1 per cent and cannot avoid this obligation. With reference to Rule 813 of the Excise Manual, the learned counsel has submitted that in terms thereof, free wastage allowance for different kinds of spirits stored in a distillery is provided but with the specific exclusion of bottled spirit; and it is clear that once the spirit is bottled and stored, the licencee remains liable to make payment of excise duty in case of wastage of bottled spirit in terms of Rule 7(11)(a) of the Rules of 1969 read with Rule 709 of Excise Manual. With reference to the decision of this Court in the case of ***Har Shankar and Others v. Deputy Excise & Taxation Commissioner and Others:*** **(1975) 1 SCC 737**, the learned counsel would submit that when the licencee has taken the licence after carefully reading the Rules of 1969, it cannot wriggle out of the conditions of licence.

22. On the question as to when IMFL became exigible to excise duty, learned counsel has contended that in the scheme of the Act of 1910 and Rules thereunder, excise duty is leviable right from the point of entry of spirit into the distillery for manufacturing of alcohol and on every point including the points of blending, manufacturing and bottling; and thereafter on the bottled spirit. It is thus contended that the respondent company is incorrect in its assertion that the goods having been destroyed in the godown, excise duty did not become leviable. It is submitted that the

moment spirit has been stored in the bottle, excise duty is leviable on the bottle, even if the same is not taken out of the warehouse.

22.1. With reference to Sections 28 and 29 of the Act of 1910, learned counsel would submit that these provisions, respectively empowering the State to impose excise duty and providing for the manner in which the duty is to be levied, clearly show that the excise duty, which in real terms is price of exclusive privilege of the State, may be imposed on the liquor manufactured in the distillery and it is wrong to contend that excise duty cannot be levied on bottled spirits or is liable to be quantified and collected only at the point of issuance of liquor from godown. Learned counsel has particularly referred to the decision of this Court in the case of ***State of U.P. and Others v. M/s Modi Distillery Etc.:*** **(1995) 5 SCC 753,** as regards various features of the demand of excise duty at different stages and different events. The learned counsel has also referred to the decision in the case of ***State of U.P. and Ors. v. M/s Mohan Meakin Brewery Ltd. and Anr.:*** **(2011) 13 SCC 588**.

23. As regards another facet of the stand of respondent that there being regular deployment of the staff of Excise Department at the distillery; the entire operation being under the control and supervision of the Excise Department; the bonded warehouse being always under the joint lock of Excise Department and the respondent; and liquor being issued only upon the Excise Inspector opening the department's lock, learned counsel would submit that such deployment of Excise Officers is necessary to ensure the

implementation of the rules and to safeguard the revenue interests of the State but for the matter, the safety and security of the distillery and prevention of any mishap by proper maintenance of the building and installations cannot be shifted on the Excise Department; and such safety and security had been the sole responsibility of the licencee. Thus, according to the learned counsel, for the fire incident in question, which could only be attributed to want of proper maintenance and upkeep of installations and/or equipment, the respondent company alone remains liable and responsible.

24. In another limb of submissions, learned counsel has referred to the fact that the respondent company had taken insurance coverage of the value of liquor and hence, was compensated by the insurer. The learned counsel has contended that when the respondent company got reimbursement of value of liquor from the insurance company, the event was akin to that of the sale of liquor; and on the principles of equity and fair play, the State cannot be put to loss in the manner that even when the distiller has received value of liquor, the corresponding excise duty would not be made available to the State. The learned counsel has also contended that omission on the part of the respondent company to take insurance coverage of the value of excise duty, while taking insurance coverage of the value of the liquor, itself amounts to negligence on the part of the respondent and for this reason too, the respondent is liable to make payment of the excise duty on the value of liquor recovered from the

insurance company. In support of these contentions, the learned counsel has referred to an order passed by the Customs, Excise and Service Tax Appellate Tribunal, Northern Bench, New Delhi[8] in the case of ***Dharampal Satyapal v. Commissioner of Central Excise, Noida:*** **(2004) 167 ELT 291**, wherein remission of duty on account of damage of goods (*pan masala*) in rain water was disallowed, when it was found that the assessee had been compensated by the insurance company with an amount which was much more than the duty involved.

25. *Per contra*, the learned counsel for the respondent has supported the order passed by the High Court allowing the writ petition and has contended that there had not been any negligence on the part of the respondent company in relation to the incident of fire and no liability could be fastened on it towards excise duty on the liquor destroyed in fire. This apart, the learned counsel would contend, with reference to Article 265 of the Constitution of India, that levy and collection of tax must be authorized by law and in the scheme of the Act of 1910, the Excise Manual and the Rules of 1969, the excise duty could have been collected only at the point of issuance of IMFL from distillery and there was no question of demand of excise duty on the stock of IMFL destroyed due to fire in the godown. The learned counsel has also submitted that in regard to the stock of IMFL destroyed in fire, there was no transfer of property to anyone else and therefore, there was no sale so as to occasion recovery of excise duty.

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8 'CESTAT' for short

26. While asserting that the respondent had taken all precautions of safe maintenance/storage of the stock of IMFL in the godown of distillery, learned counsel has submitted that the fire extinguishing equipments were installed in the distillery premises and the Fire Department issued No Objection Certificate dated 01.03.2003 on being fully satisfied with the precautions taken by the distillery in respect of the safety against fire; that the Assistant Electrical Inspector issued the certificate dated 19.09.2002 after inspection and on being satisfied that the electrical wiring equipments etc. were in accordance with Indian Electricity Act, 1966; that the distillery had obtained license to work on 06.10.1994 which was renewed annually and was valid on the date of incident; that it was specifically stated in the report of the Assistant Excise Commissioner dated 02.08.2003 that the cause of fire could not be ascertained and there was nothing to show that distillery was, in any manner, negligent or had caused the fire deliberately; that even in the report submitted by the police department, it was stated that the cause of fire could not be ascertained and there was absolutely no mention of any negligence on the part of the respondent; that in the report of the Fire Department too, it was pointed out that the cause of fire could not be ascertained; that the District Magistrate, Shahjahanpur, in his letter dated 21.10.2003 to the Principal Secretary(Excise) similarly stated that the reason of fire was unknown and there was no proof with regard to the negligence of distillery. With these facts and factors, learned counsel for the respondent would submit that the fire incident due to which IMFL got

destroyed was not caused by any negligence of the respondent and coupled with this remains the fact that complete control and supervision of the distillery was exercised by the State Excise Department. Thus, according to the learned counsel, there being no negligence on the part of the respondent, no liability of excise duty on the liquor destroyed in fire could be fastened on it.

27. While maintaining that there was no negligence on the part of the respondent, the learned counsel has assailed the legality and validity of the demand of duty against the respondent. In this regard, learned counsel has referred to Article 265 of the Constitution of India, the provisions of the Act of 1910 and the Rules thereunder as also the Excise Manual and has submitted that Rule 708 of the Excise Manual absolves the State Government from the responsibility for the destruction, loss or damage of any spirit stored in distillery by fire or theft or by gauging or proof or by any other cause, for the reason that the entire distillery (including godown) is under the lock and key of Excise Department. Learned counsel has referred to Rule 709 of the Excise Manual to submit that in the event of loss, the distilleries are made liable to make good any loss of revenue to the Government only in the event of such loss having been caused due to their negligence. Learned counsel has emphatically argued that in terms of Rule 709, if a distillery has not been negligent in safe custody of the stock of spirit, it cannot be held liable to make payment towards loss of excise

duty, if any, due to accident or reasons beyond the control of human agency.

27.1 Yet further, learned counsel has submitted that entire bottling operations including the storage of bottled liquor are done under the strict supervision of the Excise Inspector and the stocks are maintained in separate rooms under joint lock and key of the department and the company. With reference to the Rules of 1969, particularly Rule 7 thereof, the learned counsel would submit that the stock so maintained under the joint lock and key is issued for the purpose of export outside the state of UP or for the purpose of wholesale vend within the state of UP; and it is only at the point of issuance of liquor from the bottling rooms/godowns when the excise duty is liable to be quantified and collected with reference to the date, time and place of issuance. In this regard, learned counsel has also referred to the provisions contained in Sections 28 and 29 of the Act of 1910 and has re-emphasised that in exercise of powers thereunder, the State Government has chosen the point of issue for sale as being the point for quantification, calculation and collection of excise duty under its notification dated 30.03.1962 which makes it clear that the rate of duty is linked to the point of time to the date of issue for sale and not to the date of manufacture. Learned counsel would submit that IMFL in question having been destroyed on account of fire before its issuance from the godown for sale, there arise no question of collecting any excise duty on the said destroyed stock of IMFL. Learned counsel has further submitted

that under the Excise Act though the duty is levied at the point of manufacture but the point of collection of the duty is only at the time of issuance for sale and hence, to cover the eventuality in between post-manufacturing and before sale, Rule 7(11) of the Rules 1969 allows 1% of wastage and mandates to charge full rate if wastage occurs beyond 1%; and in case of destruction or loss due to fire or theft etc., the distillery is made liable for loss of revenue only if there is negligence on its part. Thus, according to the learned counsel, in the present case, where the liquor had not been issued from the godown for sale and had not been lost due to any negligence on the part of distiller, the levy of excise duty deserves to be disapproved, for being not the one authorized by law and being hit by the requirements of Article 265 of the Constitution of India. Learned counsel has referred to the decision in ***Somaiya Organic (India) Pvt. Ltd. and Anr.***

v. *State of U.P. and Anr.*: (2001) 5 SCC 519 to submit that both the levy and collection of tax must be authorised by law. According to the learned counsel, the High Court has correctly held that Rule 709 of the Excise Manual would be applicable and no duty could be imposed on the respondent as there was no negligence on its part.

28. As regards the effect of insurance and reimbursement of the value of IMFL by the insurance company, learned counsel has referred to the definition of sale in the Sale of Goods Act, 1930 as also in the U.P. Trade Tax Act, 1948, and has submitted that in the stock of IMFL destroyed due to fire, neither there was any transfer of property nor there was a sale; and

the claim received from the insurer on account of loss of goods in a fire cannot be termed as consideration. It is also submitted that not taking insurance cover for the excise duty was an irrelevant and immaterial fact because liability to pay excise duty would have arisen only when there was negligence on the part of the respondent company and not otherwise. The learned counsel has also submitted that in fact, the insurance company itself would not have cleared the insurance claim if there was any negligence on the part of the respondent and clearance of insurance claim itself fortifies that there was no negligence on the part of the respondent. It is also submitted that the respondent company had not earned any profit in the matter and in fact, it pays the excise duty when the same is recovered from the ultimate consumer but in the present case, when the respondent did not pass on and did not recover excise duty from any consumer, the question of levying the same on the respondent does not arise.

29. We have heard learned counsel for the parties at sufficient length and have examined the material placed on record with reference to the law applicable

Questions for determination

30. In view of rival submissions, the following three major questions arise for determination in this case:

A. As to whether demand of excise duty on the liquor lost in fire is authorised by law and has rightly been raised as per the applicable provisions of the Act of 1910, the Excise Manual and the Rules of 1969?

B. As to whether the fire incident in question had been an event beyond human control and no negligence could be imputed on the respondent company?

C. What would be the effect of the fact that the respondent company had taken insurance coverage only of the value of liquor (and not that of excise duty thereupon) and then, had received the insurance claim towards the value of liquor?

Relevant statutory provisions

31. Having regard to the questions involved, we may take note of the constitutional and statutory provisions, which do carry their own relevance in the present case.

32. The fundamental constitutional mandate that no tax shall be levied or collected except by authority of law is contained in Article 265 of the Constitution of India, which reads as under: -

> "**265. Taxes not to be imposed save by authority of law**.- No tax shall be levied or collected except by authority of law."

32.1. The relevant Entries 8 and 51 in List II (State List) of the Seventh Schedule to the Constitution of India could also be usefully reproduced as under: -

> "8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

> 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India: -
> (a) alcoholic liquors for human consumption;
> (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

33. The law relating to intoxicating liquors and intoxicating drugs in the State of Uttar Pradesh is principally governed by the provisions contained in the U.P. Excise Act, 1910. A few of the relevant definitions contained in Section 3 as also the relevant provisions, which are of direct bearing in the present case, as contained in Sections 17, 18, 19, 28 and 29 read as under:-

> 3. **Interpretation.-** In this Act, unless there is something repugnant in this subject or context -
> (1) "excise revenue" means revenue derived or derivable from any duty, fee, tax, fine (other than a fine imposed by a court of law), or confiscation imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs;
> *** *** ***
> (3*a*) "excise duty" and "countervailing duty" means any such excise duty or countervailing duty, as the case may be, as is mentioned in entry 51 of List II in the Seventh Schedule to the Constitution;
> *** *** ***
> (8) "spirit" means any liquor containing alcohol obtained by distillation, whether it is denatured or not;
> *** *** ***
> (11) "liquor" means intoxicating liquor and includes spirits of wine, spirit, wine, tari, pachwai, beer and all liquid consisting of or containing alcohol, also any substance which the State Government may by notification declare to be liquor for the purposes of this Act;
> *** *** ***
> (22-*a*) "excisable article" means -
> (*a*) any alcoholic liquor for human consumption; or
> (*b*) any intoxicating drug;
>
> ***** *** *****

17. Manufacture of intoxicants prohibited except under the provisions of this Act. - (1) (*a*) No intoxicant shall be manufactured;

(b) no hemp plant *(cannabis sativa)* shall be cultivated;

(c) no portion of the hemp plant *(cannabis sativa)* from which any intoxicating drug can be manufactured shall be collected;

(d) no liquor shall be bottled for sale; and

(e) no person shall use, keep or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than *tari*.

Except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Collector.

(2) No distillery or brewery or manufactory shall be constructed or worked except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Excise Commissioner under Section 18.

18. Establishment or licensing of distilleries and warehouses.-The Excise Commissioner may-

(*a*) establish a distillery in which spirit may be manufactured under a licence granted under Section 17 on such conditions as the State Government deems fit to impose;

(b) discontinue any distillery so established;

(c) licence, on such conditions as the State Government deems fit to impose the construction and working of a distillery or brewery or manufactory;

(d) establish or licence a warehouse wherein any intoxicant may be deposited and kept without payment of duty; and

(e) discontinue any warehouse so established.

19. Removal of intoxicants from distillery, etc.- No intoxicant shall be removed from any distillery, brewery, manufactory, warehouse or other place of storage established under this Act unless the duty (if any) payable under Chapter V has been paid or a bond has been executed for the payment thereof.

***** *** *****

28. Duty on excisable articles – (1) 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 in accordance with the provisions of Section 12(1); or

(b) exported in accordance with the provisions of Section 13; or

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted under Section 17; or

(e) manufactured in any distillery established, or any distillery or brewery licensed, under Section 18 :

(i) duty shall not be so imposed on any article which has been imported into India and was liable on such importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1887.

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.

(2) The State Government shall, in imposing an Excise duty or a countervailing duty as aforesaid and in fixing its rate, be guided by the directive principles specified in Article 47 of the Constitution of India.

"**29. Manner in which duty may be levied.-**Subject to such rules as the Excise Commissioner may prescribe to regulate the time, place and manner of payment, such duty may be levied in one or more of the following ways as the State Government may by notification direct :

(a) In the case of excisable articles imported under Section 12 (1)-

(i) by payment either in the province of import or in the province or territory of export; or

(ii) by payment upon issue for sale from a warehouse established or licensed under Section 18 *(d)*;

(b) in the case of excisable articles exported under Section 13-by payment either in the province of export or in the province or territory of import ;

(c) in the case of excisable articles transported-

(i) by payment in the district from which the excisable article is to be transported or

(ii) by payment upon issue for sale from a warehouse established or licensed under Section 18 *(d)* ;

(d) in the case of intoxicating drugs manufactured under any licence granted under Section 17 (1) -

(i) by a rate charged upon the quantity manufactured under a licence granted under the provisions of Section 17 (1) *(a)*, or issued from a warehouse established or licensed under Section 18 *(d)* ;

(ii) where the intoxicating drug is manufactured from hemp plant *(cannabis sativa)* cultivated or collected under a licence granted under the provisions of Section 17 (1) *(b)* and *(c)*, by an acreage rate levied on the cultivation, or by a rate charged upon the amount collected ;

(e) in the case of spirit or beer manufactured in any distillery estab-lished or any distillery brewery or manufactory licensed under Sec-tion 18-

(i) by a rate charged upon the quantity produced or issued from the distillery brewery or manufactory, as the case may

be, or issued from a warehouse established or licensed under Section 18 *(d)* ;
(ii) by a rate charged 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 :

Provided that, where payment is made upon issue of an excisable article for sale from a warehouse established or licensed under Section 18*(d)*, it shall be at the rate of duty which is in force on the article on the date when it is issued from the warehouse."

34. Rules 708, 709 and 813 of the Excise Manual, dealing with the issues pertaining to loss of spirit in distilleries and wastage allowance, read as under: -

"708. Government not liable for loss, of spirit in distilleries. - Government shall not be liable for the destruction, loss or damage of any spirit stored in distilleries by fire or theft, or by gauging, or proof, or by any other cause whatsoever. In case of fire or other accident officers in-charge of distilleries shall immediately attend, to open the premises at any hour by day or nights.

709. Distillers responsible for loss etc. of spirit in distilleries. - Distillers shall be responsible for the safe custody of stock of spirit in their distilleries and shall be liable to make good any loss of revenue caused to Government by their negligence.

*** *** ***

813. Wastage allowance. – The free wastage allowances for different kinds of spirit (excluding bottled spirit) stored in a distillery shall be as follows:

	Per cent
(1) Plain and spiced spirit … …	0.7
(2) Rectified spirit and Sophisticated spirit …	0.4
(3) Denatured spirit … …	0.5

If the total wastage on any kind of spirit does not exceed 3 per cent duty will be charged on the net wastage in excess of the free allowances. But if the total wastage exceeds 1.5 per cent duty shall be liable to be charged on the whole wastage without allowing for the free allowances at the following rates :

(1) *Plain and rectified sprits.* - At the highest rate of duty leviable on country spirit in the case of plain spirit and at the highest rate of duty leviable on I.M.F.L., in the case of Rectified sprit.

(2) *Sophisticated spirits including spiced Country spirit.* - At the rate of duty leviable on that spirit.

(3) *Denatured spirit.* - A penalty at the highest rate of purchase tax leviable on such spirit :

Provided that if it is proved to the satisfaction of the Excise Commissioner that the deficiency or wastage in excess of the prescribed limit has been caused by an accident or other unavoidable cause, the payment of duty on such deficiency or wastage shall be not be required.

When the wastage does not exceed the prescribed limit, no action need be taken by the officer-incharge, but when an excess is found in any case at the time of monthly stock-taking, the officer incharge must obtain a written explanation from the distillers and forward the same together with a full report of the circumstances to the Assistant Excise Commissioner/Deputy Excise Commissioner. The Assistant Excise Commissioner/Deputy Excise Commissioner shall charge the duty on excess wastage if he is satisfied that the wastage in excess of the prescribed limit is not on account of an accident or any unavoidable cause. In case the excess wastage is due to an accident or unavoidable cause, the matter will be referred to the Excise Commissioner for orders."

35. One major activity concerning one of the intoxicating liquors, namely, bottling and storage of foreign liquor, is regulated in the State of Uttar Pradesh by the Rules of 1969 which, *inter alia*, provide for grant of bottling licence in Form FL-3 to a distiller to bottle spirits; to a brewer to bottle beer; and to a vintner to bottle wines. Various general conditions of such a licence are contained in Rule 6 of these Rules and then, additional special conditions in relation to bottling of IMFL in bond under FL-3 licence are contained in Rule 7. Elaborate provisions have been made in Rule 7 concerning the actual operations of bottling and storage as also supervision thereof. For the present purpose, only sub-clause (11) of Rule

7 needs to be noticed and the same is reproduced hereunder (while omitting other sub-clauses, being not relevant): -

> "7. Following additional special conditions will be applicable to bottling of Indian Made Foreign Liquor in bond under F.L.-3 licence :
> *** *** ***
> (11) (a) An allowance up to one per cent. may be made on the total quantity of spirit stored during a month for actual loss in bottling and storage. The licensee shall be responsible for the payment of duty on wastage in excess of one per cent.
> (b) When the wastage does not exceed the prescribed limit, no action need be taken by the Excise Inspector incharge but if an excess is found at the time of monthly stock taking the Excise Inspector shall submit a statement to the Collector by fifth day of the month in Form F.L.B.-10 showing the quantity of actual wastage and the duty to be paid by the licensee on the excess wastage. On receipt of the statement, the Collector shall recover the duty from the licensee at the full rate of duty leviable on Indian made foreign spirit.
> *** *** ***"

36. Before proceeding further we may, at once, summarise that IMFL destroyed in fire in this case undoubtedly answered to the description of "spirit", "liquor" and "excisable article" within the meaning of Clauses (8), (11) and (22-*a*) of Section 3 of the Act of 1910, for being an intoxicating liquor containing alcohol obtained by distillation; and the same was manufactured under a licence granted in terms of Section 17 in the distillery of the respondent and was kept in the warehouse established in terms of Section 18 of the Act of 1910. Thus, this liquor (IMFL) could not have been removed from the place of storage unless excise duty payable thereupon had been paid or a bond was executed for the payment thereof. The duty was payable in terms of Section 28 and its rate was to be that as applicable on the date of its issue from the warehouse in terms of Section 29. An allowance upto 1% was admissible on the total quantity of liquor stored

during a month for actual loss in bottling and storage and else, no wastage allowance as such was admissible thereupon. Moreover, the Government was not to be liable for any loss in the quantity of this stored liquor for whatever reason; and on the other hand, the distillery, i.e., the respondent was to be responsible for the safe custody thereof and also liable to make good any loss of revenue including owing to any loss during storage beyond permissible one per cent of the total quantity. Considering that mandate, the respondent was solely liable for payment of excise duty on wastage of stored total quantity with allowance only upto one per cent, as specified. While keeping in view these salient features emerging from a combined reading of the above quoted provisions of the Act of 1910, the Excise Manual and the Rules of 1969, we may take up the questions calling for determination in this case.

Whether the demand in question is authorised by law?

37. With reference to the provisions above-mentioned, the main plank of submissions on behalf of the respondent company has been that the point of quantification and calculation of excise duty being the point of issue from the bonded warehouse and that point/stage having not reached in relation to the liquor destroyed in fire, the question of demand of excise duty would not arise. It has also been submitted that Rule 7(11) of the Rules of 1969 has no application and only Rule 709 of the Excise Manual could apply for which, negligence on the part of the distillery is required to be

proved. Before taking up the issue relating to the applicable rule, we may

deal with the fundamental question raised on behalf of the respondent, i.e., as to whether the demand is unauthorised for the reason that the point/stage of quantification and calculation of duty had not reached and liquor got destroyed while lying in warehouse.

38. As noticed, such an argument, that the demand of duty remains unauthorised for the point of issue of liquor having not reached, was not raised as such before the High Court nor the High Court had proceeded on that basis. Be that as it may, the submission even otherwise remains untenable and is required to be rejected.

39. It remains a fundamental constitutional mandate, and needs no elaboration, that in terms of Article 265 of the Constitution, both levy and collection of tax must be authorised by law, as held by this Court in the case of ***Somaiya Organics*** (supra). It remains equally trite that by virtue of Entry 51 of List II, the State has been authorised to impose duty of excise on alcoholic liquors for human consumption manufactured or produced in the State. The question raised on behalf of the respondent company, about the authority of the appellant-State to levy excise duty on the liquor in question that was destroyed in fire and had not reached the point of issue, could be adequately answered with reference to the principles concerning the event and the point where entitlement of the State to levy excise duty, and corresponding liability of the respondent to make payment thereof, comes into existence.

39.1. In the case of ***State of U.P. & Ors. v. Delhi Cloth Mills & Anr.:*** **(1991) 1 SCC 454,** this Court dealt with the question as to whether excise duty could have been levied on the wastage of liquor in transit and held that the levy of differential duty, which was charged upon reporting of excess wastage, did not cease to be an excise duty even if it was levied upon declaration of excess wastage because*, 'the taxable event* was *production or manufacture of liquor*.' This Court further made it clear that the excise duty remained a single point duty which could be levied at one of the points mentioned in Section 28 of the Act of 1910. The relevant observations and declaration of law by this Court could be usefully reproduced as under: -

> "8. The original Section 28 of the Act now re-numbered as sub-section (1) thereof, and sub-sections (2) and (3) inserted by Section 2 of the U.P. Act 7 of 1970 clearly covers Indian made foreign liquors. There can be no dispute as to military rum being one of the Indian made foreign liquors excisable under the Act. A duty of excise under Section 28 is primarily levied upon a manufacturer or producer in respect of the excisable commodity manufactured or produced irrespective of its sale. Firstly, it is a duty upon excisable goods, not upon sale or proceeds of sale of the goods. It is related to production or manufacture of excisable goods. The taxable event is the production or manufacture of the liquor. Secondly, as was held in *A.B. Abdulkadir v. State of Kerala*: AIR 1962 SC 922, an excise duty imposed on the manufacture and production of excisable goods does not cease to be so merely because the duly is levied at a stage subsequent to manufacture or production. That was a case on Central Excise, but the principle is equally applicable here. It does not cease to be excise duty because it is collected at the stage of issue of the liquor out of the distillery or at the subsequent stage of declaration of excess wastage. Legislative competence under entry 51 of List II on levy of excise duty relates only to goods manufactured or produced in the State as was held in *Bimal Chandra Banerjee v. State of M.P.:* 1970 (2) SCC 467. In the instant case there is no dispute that the military rum exported was produced in the State of U.P. In *State of Mysore v. D. Cawasji &Co.:* 1970 (3) SCC 710, which was on Mysore Excise Act, it was held that the excise duty must be closely related to production or

> manufacture of excisable goods and it did not matter if the levy was made not at the moment of production or manufacture but at a later stage and even if it was collected from retailer. The differential duty in the instant case, therefore, did not cease to be an excise duty even if it was levied on the exporter after declaration of excess wastage. The taxable event was still the production or manufacture.
>
> *** *** ***
>
> 17. …. If out of the quantity of military rum in a consignment, a part of portion is claimed to have been wastage in transit and to that extent did not result in export, the State would, in the absence of reasonable explanation, have reason to presume that the same have been disposed of otherwise than by export and impose on it the differential excise duty. A statute has to be construed in light of the mischief it was designed to remedy. There is no dispute that excise duty is a single point duty and may be levied at one of the points mentioned in Section 28."
>
> (underlining supplied)

39.2. In the case of ***M/s Mohan Meakin Brewery Ltd.*** (supra), the question of exigibility of beer to excise duty arose in respect of excess wastage in the brewery. With reference to the aforesaid decision in the case of ***Delhi Cloth Mills*** as also several other decisions and upon interpretation of Section 29*(e)(i)* of the Act of 1910, this Court reaffirmed that exigibility of the liquor (beer in that case) to excise duty occurred at the stage of manufacture or production in the following words:-

> "**33.** Section 29(*e*)(*i*) of the U.P. Excise Act makes it clear that in the case of beer manufactured in a brewery, excise duty may be levied, by a rate charged upon the quantity produced or issued from the brewery or issued from a warehouse. This means that in respect of beer that undergoes the process of filtration, the exigibility to excise duty will occur either at the end of the filtration process when it is received in storage/bottling tanks or when it is issued from the brewery. In regard to draught beer drawn directly from fermentation vessels, without further processing or filtration, the exigibility to excise duty will occur either at the end of the fermentation process or when it is issued from the brewery."
>
> (underlining supplied)

40. The very same provision [i.e., Section 29*(e)(i)* of the Act of 1910], which has been interpreted by this Court in the aforesaid decision of ***M/s Mohan Meakin*** in relation to beer manufactured in a brewery, applies with necessary variations to the case of spirit manufactured in a distillery established under Section 18. Undoubtedly, the liquor in question was manufactured by the respondent company in its distillery established under Section 18. Thus, the liquor that had been produced, became exigible to excise duty at the end of the distillation process when it was received in storage/bottling tanks or when it was issued from the distillery. To put it differently, the taxable event was production or manufacture of this liquor, for it being a duty upon the goods and not upon sale or proceeds of sale of the goods.

41. As per Section 19, no intoxicant (and that obviously includes the liquor manufactured by the respondent) can be removed from the distillery or the place of storage unless the duty leviable thereupon has been paid or a bond has been executed for the payment thereof. Considering the overall scheme of the Act and the Rules, it may not be out of place to interpret the expression “removal” in Section 19 to include wastage in excess of permissible limit of total quantity of spirit produced or manufactured and stored. A comprehensive look at the scheme of Sections 17 to 19 and 28 and 29 of the Act of 1910 and the enunciations of this Court leave nothing to doubt that in respect of the liquor that had undergone the process of distillation, exigibility to excise duty had occurred at the end of

the distillation process or when it was issued from the distillery. The point of quantification of this duty, even if linked in point of time to the date of issue for sale in terms of proviso to Section 29, does not relate to the 'event of chargeability' that had occurred as soon as the liquor was distilled and received in the bottling tank or had been otherwise issued from distillery. In other words, the liquor that was lying stored in the bonded warehouse had already become subject to the excise duty, with postponement of actual charging of the duty as per the rate applicable on the date and time of issue for sale from the warehouse. It gets perforce reiterated that taxable event was production or manufacture, and not sale, of the liquor. In this view of the matter, the submission that the levy in question is not authorised by law, and is hit by Article 265 of the Constitution of India, remains untenable and is required to be rejected.

42. As regards the applicable rules for the demand in question, the High Court has proceeded on the reasoning that the present one had not been the case of wastage in handling and therefore, Rule 7(11) of the Rules of 1969 would not be applicable. The respondent company has also submitted that Rule 7(11) of the Rules of 1969 is inapplicable and it is pointed out that even the State Government had directed the Excise Commissioner to proceed under Rule 709 of the Excise Manual and not Rule 7(11) of the Rules of 1969, which deals only with wastage in normal course of bottling operation and storage. It has further been contended that only Rule 709 of the Excise Manual could be taken recourse of by the

Government, but in that case, the distillery could be made liable only if it could be shown that the loss had been caused to the Government by any negligence on part of the distillery.

43. In regard to the above submissions, though the demand in question would be essentially referable to Rule 709 of the Excise Manual, but Rule 7(11) of the Rules of 1969 provides for an allowance up to 1% on the total quantity of spirit stored during a month towards actual loss in bottling and storage; and the licencee is responsible for payment of duty on the wastage in excess of 1%. This Rule 7(11) makes it clear that even in relation to the wastage in storage, the allowance is only up to 1% of total quantity of spirit stored during a month. This provision may also be read with Rule 813 of the Excise Manual, which provides for free wastage allowance for different kinds of spirit in a distillery with the specified percentage, namely the plain and spiced spirit (0.7%), rectified and sophisticated spirit (0.4%), and denatured spirit (0.5%). The significant aspect of the matter is that though wastage allowance is provided for different kinds of spirit but, the bottled spirit is specifically excluded therein.

44. A comprehensive look at the relevant provisions of law makes it clear that so far as IMFL is concerned, no provision is made in the Excise Manual for any wastage allowance in relation to the bottled sprit, but, in terms of Rule 7(11) of the Rules of 1969, an allowance up to 1% on the total quantity of spirit stored during a month may be allowed for actual loss in bottling and storage. Any allowance for any wastage or loss beyond the

same remains, obviously, impermissible. The logic is not far to seek. As noticed, in respect of the liquor that had undergone the process of distillation, exigibility to excise duty had occurred at the end of the distillation process or when it was issued from the distillery. Thus, any loss or wastage of the bottled spirit would be directly a loss of excise duty it had already become exigible to. The rule making authority has taken abundant care to ensure that there is no pilferage of the excise revenue available to the Government on the bottled spirit by any act of wastage, while making the licencee responsible for payment of duty on wastage in excess of 1% on the total quantity of spirit stored during the month. Thus, neither the submissions on behalf of the respondent company nor the observations of the High Court about the total inapplicability of Rule 7(11) could be accepted. In other words, Rule 7(11) of the Rules of 1969 is required to be taken into account for the legal consequences that so far as the bottled spirit is concerned, the licencee remains responsible for payment of duty on any kind of wastage in excess of 1%. Coupled with this provision, Rule 709 of the Excise Manual makes it clear that the distillery remains responsible for safe custody of the stock of spirit and remains liable to make good any loss of revenue caused to the Government by their negligence.

45. Therefore, a plain answer to the legal issue raised on behalf of the respondent company is that the demand in question cannot be said to be unauthorised but, its validity would depend on answer to the question as to whether negligence could be imputed on the respondent company in terms

of Rule 709 of the Excise Manual. We shall examine various features related with this question in the next segment of discussion.

Whether respondent company remains liable to pay excise duty on the liquor lost in fire

46. As noticed, the fire incident in question led the Excise Commissioner to propose recovery of excise duty on the stock of IMFL destroyed in fire from the respondent company and the respondent company maintained that the incident was due to the reasons beyond human control and there was no negligence on its part. However, ultimately, the Excise Commissioner passed the order dated 11.07.2006 holding, *inter alia*, that the respondent company had not arranged the fire proof electric equipments of good quality due to which the incident had taken place; and the carelessness of the distillery for the safety of stock cannot be attributed to an act of God. The High Court has, however, held that the inference drawn by the Excise Commissioner was nothing but of conjectures and surmises without any material foundation. The High Court has also observed that when a fiscal liability was founded on a condition precedent, i.e., negligence on the part of the person concerned, no responsibility could be fixed unless such negligence was shown to be founded on some material. According to the appellants, the incident in question is attributable only to some negligence on the part of the respondent company and it had not been an act of God for having occurred on account of fault in the electrical installation and short circuit; and the

incident was avoidable if proper and necessary care was taken by the respondent company. On the other hand, on behalf of the respondent, though the principles relating to an “act of God” have not been invoked as such before us but the contention has been that the fire was not caused by the negligence of the respondent company in maintaining safe custody of the stock of spirits; and the incident had been the one which occurred for the reasons beyond the control of human agency. It has also been contended that the entire distillery (including the godown) has been under lock and key of the department; and the department had been exercising complete control and supervision over the distillery and, therefore, no negligence could be imputed on the respondent.

Control of Department over the distillery and godown: effect of

47. In view of rival submissions, we may begin with the issue relating to supervision and control of State Excise Department over the distillery and the godown. The submissions made in this regard on behalf of the respondent company remain baseless and have only been noted to be rejected. In the scheme of the Act of 1910, the Rules of 1969 and the Excise Manual, it is evident that the Government is not liable for destruction, loss or damage of any spirit stored in distillery by fire or theft or any other cause (as per Rule 708 of the Excise Manual). On the other hand, distillery is made responsible for safe custody of the stock of spirit and is also made liable to make good any loss of revenue caused to the Government by their negligence.

47.1. It has rightly been contended on behalf of the appellants that the purpose of posting Excise Officers in the distillery is for securing the interest of the State by collection of revenue and to put a check over any act of theft, wastage, illegal sale as also to ensure proper implementation of rules. Rule 736 of the Excise Manual makes it clear that the doors of buildings or rooms which are used for storage of spirit are under double locks, where one of the locks is of the Excise Department and other of the distillery. The other provisions of the Rules of 1969 and the Excise Manual further make it clear that as regards general arrangement and management of distilleries, elaborate provisions have been made like as to how the pipes would be laid, fixed and painted, as to how lock fastening would be constructed etc. Even a minor alteration in the distillery arrangement requires previous sanction of the Excise Commissioner (Rule 771) and repairs etc. are to be reported (Rule 772). The rules in their conspectus provide for strict supervision and control of the Excise Department over the working of distillery at every stage but that supervision and control does not correspondingly absolve the distillery of its duty and responsibility towards safe custody of the stock of spirit and towards avoidance of wastage. Any doubt in that regard is effectively quelled by a combined reading of Rules 708 and 709 of the Excise Manual as also Rule 7(11) of the Rules of 1969. The contentions in this regard as urged on behalf of the respondent company are, therefore, rejected.

Negligence

48. Now, for entering into the core of this matter, i.e., as to whether the loss of revenue caused to the Government by destruction of liquor in fire could be attributed to any negligence on the part of the respondent company, we may take note of the legal principles related with the liability arising out of, or due to, negligence as also the exceptions and defences in relation to any claim based on negligence.

49. "Negligence" is one such class of "wrongs" that leads to liability. The fundamental jurisprudential principle of "liability" is crisply defined in Salmond on Jurisprudence[9] thus: -

> "Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong."

"Liability" arises from breach of duty, which may be in the form of an act or omission. We need not delve, for the present purpose, on the classification of liability into civil or criminal and remedial or penal and various other jurisprudential features of liability. In the present case, we are primarily concerned with the question of liability arising out of negligence. Having regard to the questions involved and the provisions applicable, it would be appropriate to take into comprehension the meaning and connotation of the term "negligence" with reference to the dictionaries, lexicons and decided cases.

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9 12th Edition, p. 349.

49.1. In Concise Oxford English Dictionary[10], the term “negligence” is defined and explained as under: -

> “**negligence ▪ n**. failure to take proper care over something. ➤ Law breach of a duty of care which results in damage.”

The adjective of this expression is “negligent” and its adverb form is ‘negligently’. These expressions, for deeper understanding need to be correlated with the verb ‘neglect’ that has been defined and explained in the same dictionary as under: -

> “**neglect ▪ v.** fail to give proper care or attention to. ➤ fail to do something. ▪ **n.** the state or process of neglecting or being neglected. ➤ failure to do something.”

49.2. In Webster’s Third New International Dictionary,[11] the terms “neglect” and “negligence” are defined and explained as under: -

> “**ne•glect 1 a :** to give little or no attention or respect to **:** consider or deal with as if of little or no importance **:** DISREGARD, SLIGHT <some of the most significant issues have been *~ed* -Bruce Payne> <*~ed* the real needs of the students> **b :** to fail to attend to sufficiently or properly **:** not give proper attention or care to ….. **2 :** to carelessly omit doing (something that should be done) either altogether or almost altogether **:** leave undone or unattended to through carelessness or by intention **:** pass lightly over <*~ing* their obvious duty> <*~ed* to mention that he was a convict –Bernard Smith>.
>
> “**neg•li•gence 1 a :** the quality or state of being negligent **b :** a failure to exercise the care that a prudent person usu. exercises – opposed to *diligence;*”

10 11th Edition, p. 958.
11 1976 Edition Vol. II p. 1513

49.3. In Black's Law Dictionary[12], "negligence" and several of its forms and features have been explained. For the present purpose, we may usefully extract the relevant parts as under: -

> "**negligence,** *n.* (14c) **1.** The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances…..
>
> **active negligence.** (1875) Negligence resulting from an affirmative or positive act, such as driving through a barrier. Cf. *passive negligence*.
>
> **advertent negligence.** (1909) Negligence in which the actor is aware of the unreasonable risk that he or she is creating; RECKLESSNESS. – Also termed *willful negligence; supine negligence*.
>
> **casual negligence.** (1812) A plaintiff's failure to (1) pay reasonable attention to his or her surroundings, so as to discover the danger created by the defendant's negligence, (2) exercise reasonable competence, care, diligence, and skill to avoid the danger once it is perceived, or (3) prepare as a reasonable person would to avoid future dangers.
>
> **gross negligence.** (16c) **1.** A lack of even slight diligence or care.
> ● The difference between *gross negligence* and *ordinary negligence* is one of degree and not of quality. Gross negligence is traditionally said to be the omission of even such diligence as habitually careless and inattentive people do actually exercise in avoiding danger to their own person or property. – Also termed *willful and wanton misconduct*. **2.** A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages. – Also termed *reckless negligence; wanton negligence; willful negligence; willful and wanton negligence; willful and wanton misconduct; hazardous negligence; magna neglegentia.*
>
> **inadvertent negligence.** (18c) Negligence in which the actor is not aware of the unreasonable risk that he or she is creating, but should have foreseen and avoided it. – Also termed *simple negligence*.

12 10th Edition pp. 1196-1198

> **passive negligence.** (18c) Negligence resulting from a person's failure or omission in acting, such as failing to remove hazardous conditions from public property. Cf. *active negligence*."

49.4. In P. Ramanatha Aiyar's Advanced Law Lexicon[13], various connotations of the expression "negligence" are stated, *inter alia*, in the following terms: -

> "**Negligence.** Failure to use the care that a reasonable and prudent person would have used under the same or similar circumstances.
>
> Negligence in law signifies a coming short of the performance of duty.
>
> Failure to use the care that a reasonably prudent and careful person would use under similar circumstances.
>
> Negligence is "the absence of proper care, caution and diligence; of such care, caution and diligence, as under the circumstances reasonable and ordinary prudence would require to be exercised."

50. Salmond on Jurisprudence[14] refers to a terse exposition in ***Grill v. General Iron Screw Colliery Co.*: (1866) L.R. 1 C.P.**, that negligence is "*the absence of such care as it was the duty of the defendant to use*"; and further explains the subtle distinction of inadvertent and advertent negligence in the following: -

> "It is to be observed, in the second place, that carelessness or negligence does not necessarily consists in thoughtfulness or inadvertence. This is doubtless the commonest form of it, but it is not the only form. If I do harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no danger, I am certainly guilty of negligence. But there is another form of negligence, in which there is no thoughtlessness or inadvertence whatever. If I drive furiously down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly and intentionally

13 5th Edition, Vol. 3, p. 3435
14 *Ibid* p. 380

> expose them to the danger. Yet if a fatal accident happens, I am liable, at the most, not for wilful, but for negligent homicide. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently (*c)*.
>
> Negligence then is failure to use sufficient care, and this failure may result from a variety of factors….."

51. Without multiplying the case law on the topic, sufficient it would be to refer to the connotation of the term "negligence" explained succinctly by this Court in the case of ***State of Maharashtra and Ors.*** **v.** ***Kanchanmala Vijaysing Shirke and Ors.*****: (1995) 5 SCC 659** as follows: -

> "9.…'Negligence' is the omission to do something which a reasonable man is expected to do or a prudent man is expected to do..."

52. Therefore, it could be reasonably summarised for the present purpose that failure to exercise that care which a reasonably prudent person would usually exercise under similar circumstances would amount to negligence; it is not necessary that negligence would always be advertent one where the wrongdoer is aware of unreasonable risk being created but it may be inadvertent or passive too, arising for want of foresight or because of some omission. However, the question as to whether the liability because of negligence could be fastened on the respondent company or not cannot be determined without dealing with the other aspects related with exceptions and defence to the allegation of negligence.

Act of God

53. In its assertions before the Department as also before the High Court, the respondent company attempted to rely upon the principles related with “act of God” and it was sought to be suggested that if the fire had taken place despite the company having taken all care, it was nothing but an act of God of which, no human agency had any control. The High Court has accepted this part of submissions. Though in the argument before us, learned counsel for the respondent has not laid much stress on this theory but looking to the relevant background, it would be apposite to take note of a few features related with “act of God” and its connotations on the jurisprudential principles of liability.

54. In P. Ramanatha Aiyar’s Advanced Law Lexicon[15], variegated connotations of the term “act of God” or *Vis major* are specified with reference to the treatise and citations. A few relevant aspects for the present purpose could be usefully extracted as under: -

> “All natural agencies, as opposed to human activities, constitute acts of God, and not merely those which attain an extraordinary degree of violence or are of very unusual occurrence. The distinction is one of kind and not one of degree. The violence or rarity of the event is relevant only in considering whether it could or could not have been prevented by reasonable care : if it could not, then it is an act of God which will relieve from liability, howsoever trivial or common its cause may have been. If this be correct, then the unpredictable nature of the occurrence will go only to show that the act of God in question was one which the defendant was under no duty to foresee or provide against. It is only in such a case that the act of God will provide a defence.” R.F.V. HEUSTON. *Salmond on the Law of Torts* 330 (17th ed. 1977).
>
> “A natural act such as a storm, floods or an earthquake which cannot be foreseen and usually absolves a person from liability if damage occurs as a result.

15 5th Edition, p. 83

> Any event so out of the ordinary that it could not have been prevented by any amount of human care and forethought, *e.g.* lightning, freak tidal waves or floods *etc.,* which relieves a contractor, such as a freight carrier, of any liability for losses suffered as a result of it."
>
> "…..The expression 'act of God' signifies the operation of natural force free from human intervention, such as lightning. It may be thought to include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones and tidal-bures and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse, unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing at….."

54.1. The case of ***Mahadeva Shetty*** (supra) related to the loss suffered by the claimant due to the injuries sustained in a vehicular accident that rendered him paraplegic. The bus in which he was a passenger plunged into a pit after rolling down from a great height. The stand of the appellant Corporation in opposition to his claim petition was that the accident was not due to rash and negligent driving but was an act of God. In that context, this Court explained the essential features concerning an act of God in contradistinction to an act or omission of human beings in the following words: -

> "9. The expression "act of God" signifies the operation of natural forces free from human intervention, such as lightening, storm etc. It may include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones, tidal waves and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing. For instance, where by experience of a number of years, preventive action can be taken, Lord Westbury defined the act of God (*damnum fatale* in Scotch Laws) as an occurrence which no human foresight can

> provide against and of which human prudence is not bound to recognize the possibility. This appears to be the nearest approach to the true meaning of act of God. Lord Blancaburgh spoke of it as "an irresistible and unsearchable providence nullifying our human effort".

54.2. In the case of ***Vohra Sadikbhai Rajabhai*** (supra), the water released from a dam constructed by the respondents flooded the land of the appellants and destroyed the plantation therein. As per the respondents, the water had to be released from the dam as it reached alarming level because of heavy rains and non-release would have breached the dam; and that the action was taken in public interest and it was occasioned because of the rains, which was an act of God. The appellants, on the other hand, contended that it was sheer negligence on the part of the respondents in not maintaining low level of the water keeping in mind the ensuing monsoon season and, therefore, the damage which the appellants suffered had direct nexus or causal connection with the aforesaid act of negligence and it could not be attributed to the rains; and hence, the respondents could not term it as an act of God and excuse themselves from tortious liability. The Trial Court and the High Court accepted the case of respondents that they were forced to release the water due to the heavy rains; and that the land of the appellants was situated adjacent to the river bank and, therefore, due to heavy rain, the river could have overflown resulting in entering of the water into the fields of the appellants in any case.

54.2.1. In appeal, this Court, while examining the question as to whether it were a case of gross negligence, observed that the respondents did not properly controvert the allegations of the appellants that water was not maintained at an appropriate level to take care of ensuing monsoons. They had also not supported their plea to the effect that had the water been not released, it would have breached the dam and that act would have caused more public harm. This Court held that since the dam was constructed and maintained by the respondents and the appellants suffered losses as a result of release of water from the said dam, onus was on the respondents to prove that they had taken proper care in maintaining appropriate level of water in the dam. This Court further held that the respondents were the owners of the dam in question; and they were expected to keep the dam in such a condition which avoided any loss or damage of any nature to the neighbours or passersby. This Court observed that merely by saying that the level of water in the dam increased because of monsoon rains and that the water was released in public interest could not be treated as discharging the burden on the part of the respondents in warding off the allegation of negligence. While rejecting the defence of an “act of God”, this Court explained thus: -

> “22. …. An act of God is that which is a direct, violent, sudden and irresistible act of nature as could not, by any amount of ability, have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. Generally, those acts which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause will come under the category of acts of God. Examples are: storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost, or a

> tidal bore which sweeps a ship in mid-water. What is important here is that it is not necessary that it should be unique or that it should happen for the first time. It is enough that it is extraordinary and such as could not reasonably be anticipated……"

54.3. The case of ***Patel Roadways*** (supra) essentially related to a common carrier's liability when goods entrusted to it were destroyed in a fire that took place in the godown of the appellant. As regards the question of negligence vis-a-vis a common carrier's liability, this Court referred to a passage from *Sarkar on Evidence* (15th Edn., 1999) at p. 1724 and observed that as a rule, negligence is not to be presumed; it is rather to be presumed that ordinary care has been used but that this rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged or delayed in delivery.

55. The present one had not been a case where anything related with the forces of nature like storm, floods, lightning or earthquake had been in operation or caused the fire. When nothing of any external natural force had been in operation in violent or sudden manner, the event of the fire in question could be referable to anything but to an act of God in legal parlance. The observations of High Court in this regard do not appear sound and are required to be disapproved.

56. The submissions before this Court on behalf of the respondent company had been that the company had taken all precautions which was expected of it and yet if the fire incident took place, it was something

beyond human control for which respondent company cannot be held liable. This line of submission, at best, could be taken into another exception to the rules governing liability, where inevitable accident is generally recognised as a ground of exception. Again, we may refer to the principles stated by Salmond[16] thus: -

> "Accident, like mistake, is either culpable or inevitable. It is culpable when due to negligence, but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. Inevitable accident is commonly a good defence, both in the civil and in the criminal law.
>
> To this rule, however, there are, at least, in the civil law, important exceptions. These are cases in which the law insists that a man shall act at his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts (*f*), or to construct a reservoir of water (*g)*, or to accumulate upon his land any substance which will do damage to his neighbours if it escapes (*h)*, he will do all these things *suo periculo* (though none of them are *per se* wrongful), and will answer for all ensuing damage, notwithstanding consummate care….."

57. To accept the case of respondent company about it being an "inevitable accident", it is to be seen if preventing of the fire in question would have required a degree of care from the respondent company beyond or exceeding the standard demanded by law. The question would thus be as to what had been the normal and reasonable requirement for safe custody of the liquor in question and if the respondent company, despite having attended on all such normal and reasonable requirements, could not have prevented the fire in question. While looking for an

16 *Ibid* p. 399

appropriate answer to this question, we shall have to take an overall view of the material available on record as also all the surrounding factors and circumstances. In this regard, before proceeding further, we could profitably refer to a significant guiding principle embodied in the maxim *res ipsa loquitur* whereby negligence may be presumed from the mere fact of accident; of course, the presumption depends upon the nature of the accident and the surrounding factors.

Res ipsa loquitur

58. In order to understand the operation of the maxim *res ipsa loquitur*, we may usefully refer to a couple of the decisions of this Court. Of course, these decisions related with vehicular accidents but the principles therein remain fundamental in operation of *res ipsa loquitur*.

58.1. ***Shyam Sunder and Ors.* v. *The State of Rajasthan*: (1974) 1 SCC 690** had been a case where the victim was travelling in a truck whose engine got fire and while jumping from the vehicle, he struck against a stone on the side of the road and died on the spot. The High Court in that case held that merely for the truck catching the fire would not be evidence of negligence on part of the driver; and that *res ipsa loquitur* had no application. However, this Court, *inter alia*, pointed out and held as under:-

> "9…. The **maxim res ipsa loquitur** is resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not prevent the plaintiff from recovering the damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negli-gence of the defendant. The fact of the accident may, sometimes,

constitute evidence of negligence and then the maxim **res ipsa loquitur** applies."

58.1.1. This Court then quoted the following passage from the case of ***Scott v. London & St. Katherine Docks*: (1865) 3 H&C 596, 601: -**

> "... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordi-nary course of things does not happen if those who have the man-agement use proper care, it affords reasonable evidence, in the ab-sence of explanation by the defendants, that the accident arose from want of care."

58.1.2. This Court further explained the operation of this maxim for importing strict liability into negligence cases and observed: -

> "The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (see **Barkway v. S. Wales Transo** [(1950) 1 All ER 392, 399])."

58.2. In ***Pushpabai Purshottam Udeshi and Ors. v. M/s. Ranjit Ginning & Pressing Co. (P) Ltd. and Anr.* (1977) 2 SCC 745**, this Court again explained the application of the principle of *res ipsa loquitur* and explained various features thereof in the following words: -

> **"**6**.** The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some

> other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states: “The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused”. In Halsbury's Laws of England, 3rd Ed., Vol. 28, at p. 77, the position is stated thus: “An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence ‘tells it own story’ of negligence on the part of the defendant, the story so told being clear and unambiguous”. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part…..”

The respondent company remains liable

59. For what has been discussed hereinabove, this much is apparent that in this case, the warehouse in question indeed got engulfed in fire and that led to destruction of the liquor stored therein. Here, the respondent company could be held liable to pay the excise duty on the liquor destroyed in fire only if it could be held negligent in not ensuring safe custody of the stored liquor. As regards this aspect, the fact that Department had control and supervision over the distillery and godown would not absolve the respondent of its liability. Further, the fire incident in question cannot be termed as an “act of God”.

60. The matter then boils down to the question if the fire incident could be said to be an inevitable accident. For that matter, we need to examine as what had been the normal and reasonable requirement for safe custody

of the liquor in question and as to what could be deduced from the surrounding factors.

60.1. One of the basic factors to be noticed is that the goods in question were not ordinary goods but had been containing alcohol which, by its very nature, is highly inflammable. Therefore, a particular nature of care which might be sufficient as regards ordinary goods may not be adequate or sufficient for the goods in question.

60.2. On 19.09.2002, the Assistant Electricity Inspector who conducted periodical inspection of the premises in question made two observations. One of them was a minor aspect that 'Caution' plate was not placed at certain prominent place but the other observation was a significant one that at one point of distribution panel, earth wiring was found with thin wire; and it was suggested that same should be removed and strip earthing should be done.[17] On 01.03.2003, while issuing No Objection Certificate, the Fire Brigade Officer, *inter alia,* observed that firefighting equipments were at right place and were in working condition but in future, they should be tested in fire station Shahjahanpur before refilling; and it was also suggested that Foam Installation should be provided for better management of firefighting arrangements.[18]

60.2.1. From the material placed on record, it is not forthcoming if strip earthing had indeed been carried out, though the respondent company generally stated in its letter dated 23.09.2002 that what was pointed out by

17 *vide* paragraph 7.1 supra
18 *vide* paragraph 7.3 supra.

the Assistant Electricity Inspector had been carried out. As to when strip earthing was done and in what manner is not forthcoming. Further, it is also not forthcoming if Foam Installations were provided, as suggested by the Fire Brigade Officer. In view of extra care required of the highly inflammable material, significance of none of these aspects could be gainsaid.

60.3. Though it is true that as per the suggestions made in the reports relating to the fire incident in question, exact cause of fire could not be ascertained but there had been indications that the officers, including the Excise Officer and Station House Officer had seen burnt wires; and it was reported that the fire 'possibly' took place because of short circuit. Taking note of these facts as also the other facts that godown was an old one and the roof of the godown was made of asbestos sheets, the Excise Commissioner, in his order dated 11.07.2006, inferred that short circuit could have taken place in old electric wiring in the godown and in that context, observed that the licencee had not arranged the fire proof electric equipments of good quality, which led to the incident in question.

61. A few words as regards 'short circuit' would also be apposite at this juncture.

61.1. Short circuit is explained in the Dictionary of Technical Terms[19] by F.S. Crispin as follows :-

> "Short circuit (*elec.):* A path of low resistance placed across an electrical circuit causing an abnormal flow of current."

19 11th Edition, p. 369.

61.2. In McGrow-Hill Encyclopedia of Science and Technology[20], the relevant features of short circuit are stated as under: -

> "An abnormal condition (including an arc) of relatively low impedance, whether made accidentally or intentionally, between two points of different potential in an electric network or system. *SEE CIRCUIT (ELECTRICITY); ELECTRICAL IMPEDANCE.*
>
> Common usage of the term implies an undesirable condition arising from failure of electrical insulation, from natural causes (lightning, wind, and so forth), or from human causes (accidents, intrusion, and so forth). From an analytical viewpoint, however, short circuit represent a severe condition that the circuit designer must consider in designing an electric system that must withstand all possible operating conditions. The short circuit thus is important in dictating circuit design parameters (wire size and so on) as well as protective systems that are intended to isolate the shorted element. *SEE ELECTRIC PROTECTIVE DEVICES; ELECTRICAL INSULATION; LIGHTNING AND SURGE PROTECTION."*

61.3. In the present case, even when the exact cause of fire could not be ascertained, the indications in the reports like that of Assistant Excise Commissioner dated 02.08.2003[21] that burnt cables were seen in the debris and possibility had been of short circuit, the only inference could be about some fault or shortcoming in electric installations (equipments and/or wiring) which led to the abnormal flow of current and thereby, to the fire incident in question.

62. As noticed, the fire incident in question had not taken place due to operation of any forces of nature. It has also not been the case that the fire was a result of any mischief by any person. Noticeably, the fire that started around 12:55 p.m. on 10.04.2003 could be brought under control by the

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20 6th Edition, volume 16, p 387.

21 *vide* paragraph 11 supra.

firefighters only by 5:00 a.m. on 11.04.2003. When all the relevant factors are cumulatively taken into account, we find it difficult to accept that the fire and the resultant loss had been beyond the control of human agency so as to be termed as inevitable accident. Obviously, the fire had not generated on its own and, with appropriately laid fire proof electrical installations as also firefighting measures, the incident was an avoidable one or at least the loss could have been minimised.

63. As noticed, the fault of “negligence” need not always be of active negligence or of gross negligence, but it may also be of an inadvertent negligence or of a passive negligence. It does not require much of discussion to say that the goods in question, being highly inflammable, required extra and excessive care for their safe custody; and any laxity or slackness in that regard was impermissible. To put it differently, what was required for ensuring safe custody of the goods in question was that of heightened safeguard measures with foresight. When the respondent had not been able to protect the goods in question from fire within the warehouse and when all other factors, as noticed above, are taken into account, the negligence as contemplated in Rule 709 of the Excise Manual is directly attributable to the respondent company. In other words, even if the present case is taken to be that of inadvertence or of unintentional omission on the part of the respondent company, it would fall within the

definition of “negligence” for the purpose of Rule 709 of the Excise Manual.

63.1 In the given set of facts and circumstances, we are unable to endorse the approach and views of the High Court, where it had basically proceeded on the premise as if the incident in question was referable to an 'act of God'. As noticed, the incident in question had not been because of any forces of nature and cannot be said to be an 'act of God'. The criticism of Excise Commissioner's order dated 11.07.2006 by the High Court, while taking the observations and findings therein being of surmises and conjectures, is also required to be disapproved. What the Excise Commissioner had observed in the order dated 11.07.2006 had been of his inferences, which were deduced out of the facts and circumstances of the case and in true application of the principles of *res ipsa loquitur*.

64. Hence, we have no hesitation in disapproving the order of the High Court and in endorsing the views of the Excise Commissioner in the order dated 11.07.2006.

Insurance coverage only of the value of liquor: effect of

65. Before concluding on the matter, it would also be appropriate to deal with yet another feature of this case relating to the insurance coverage taken by the respondent company only of value of liquor and not that of excise duty payable thereupon.

66. Admittedly, the respondent company had taken insurance coverage of the value of liquor and indeed received such value of liquor from the insurer. However, respondent company did not take insurance coverage of the excise duty payable over such value of liquor. The appellants contend

that when the distiller has received value of liquor, on the principles of equity and fair play, the corresponding excise duty ought to be made available to them. It has also been contended that omission on the part of the respondent company to take insurance coverage of value of excise duty, while taking coverage of the value of liquor, itself amounts to negligence. On the other hand, the respondent would submit that the claim received from the insurer cannot be termed as consideration because there was no transfer of property in goods and there was no sale. It has also been submitted that there was no such requirement in law that the respondent company was to take insurance coverage of the excise duty too. Yet further, it has also been submitted that clearance of insurance claim by the insurer itself shows that there was no negligence on the part of the respondent. The Excise Commissioner in its order dated 11.07.2006 has observed that the distiller had taken insurance of the value of goods and for this reason too, it remained rather lax in taking all care against fire.

67. Having examined the matter in its totality, we are clearly of the view that the liability of the respondent company in this matter is rather fortified from the facts that it had taken insurance coverage of the value of liquor and indeed received such claim from the insurer. Further, failure to insure the risk of excise duty liability cannot extricate the respondent from that liability.

68. As noticed, in the scheme of law applicable, when duty of excise is upon the goods and the taxable event is the production or manufacture of

the liquor, the liability to pay excise duty had arisen as soon as the liquor was manufactured. Thereafter, when the liquor got destroyed in fire but its value was recovered from the insurer, in our view, these events shall answer to the broad expression “issue of an excisable article for sale from a warehouse” for the purpose of proviso to Section 29(*e*) of the Act of 1910. Putting it differently, receiving of insurance claim over the value of goods by the respondent related back to the date of fire and the respondent became liable to pay excise duty at the rate which was in force on the date of fire, which would be deemed to be the date of “issue” from the warehouse.

68.1. In the given set of facts and circumstances, we are not dilating on the decision of CESTAT in the case of ***Dharampal Satyapal*** (supra) wherein remission of duty on account of damage of *pan masala* in rain water was disallowed, when it was found that the assessee had been compensated by the insurance company with an amount which was much more than the duty involved but, the submissions in the present case that the goods had not been sold and duty has not been recovered from consumers, do not take the case of respondent company any further. It was for the respondent company to take necessary measures and care to ensure that payable excise duty would reach the appellants once the goods had been manufactured.

69. Another facet of this part of matter remains, and we agree with the appellants, that not taking of insurance coverage of the excise duty while

taking such coverage on the value of liquor itself amounts to negligence on the part of the respondent company. As noticed, “negligence” has different connotations and any particular act or omission, which may not be negligence in a particular set of facts may still amount to negligence in another set of facts. In the facts of the present case, where excise duty became payable on manufacture of liquor, it was obviously expected of the respondent company, as a reasonable and prudent distiller, to take all necessary steps to safeguard not only the liquor and value thereof but also the corresponding interest of the Government, i.e., the excise revenue. The Excise Commissioner had been rather justified in drawing inference that the respondent company, after having secured the value of goods for its purpose, might not have been conscious and alert in taking all the necessary care to guard against any loss to the Government due to any mishap like fire.

70. The submission, that insurer would not have made payment of insurance claim if there was any negligence on the part of the respondent company, has its own shortcomings. The terms of fire insurance policy have not been placed on record and it cannot be deduced as to what were the terms and conditions of that policy under which insurer had acted in accepting the claim of the respondent company. Secondly, what was not treated as negligence by the insurer for the purpose of insurance claim would not *ipso facto* become a proposition binding on the appellants as

regards loss of revenue because of loss of liquor in fire. Such a contention of the respondent could only be rejected.

Summation

71. In summation of what has been discussed hereinabove, we hold, -

(i). The demand raised by the appellants against the respondent company, of excise duty on the liquor lost in fire, is authorised by law and has rightly been raised as per the applicable provisions of the Act of 1910, the Excise Manual and the Rules of 1969.

(ii). The fire incident in question cannot be said to be that of an event beyond human control and the High Court has been in error in holding that no negligence could be imputed on the respondent company.

(iii). The fact that the respondent company had taken insurance coverage only of the value of liquor (and not that of excise duty thereupon) and then, had received the insurance claim towards the value of liquor also operates against the respondent company and fortifies the conclusion about negligence of the respondent company.

71.1. Upshot of the discussion foregoing is that this appeal deserves to succeed and the writ petition filed by the respondent company deserves to be dismissed. As a necessary corollary, the miscellaneous application filed by the respondent company, for consideration of its refund application, is rendered redundant and deserves to be dismissed as such.

Conclusion

72. Accordingly, and in view of the above, these appeals are allowed; the impugned orders dated 10.04.2017 in Misc. Bench No. 4493 of 2006 and dated 06.11.2019 in C.M. Application No. 90936 of 2019 are set aside; and the writ petition as also the miscellaneous application filed by the respondent company are dismissed but with no order as to costs.

……J.
(A.M. KHANWILKAR)

……J.
(DINESH MAHESHWARI)

……J.
(KRISHNA MURARI)

New Delhi;
January 05, 2022

REPORTABE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). 169-170 of 2022
(Arising out of SLP(C) Nos. 11596-11597 of 2020)

STATE OF UP
THROUGH SECRETARY (EXCISE) & ORS. ….APPELLANT(S)

VERSUS

M/S MCDOWELL AND COMPANY LIMITED ….RESPONDENT(S)

JUDGMENT

Dinesh Maheshwari, J.

Contents

Preliminary and brief outline

Leave granted.

3. By way of these appeals, the State of Uttar Pradesh and its officers related with the Excise Department as also the District Magistrate, Shahjahanpur have essentially questioned the order dated 10.04.2017 in Misc. Bench No. 4493 of 2006, whereby the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow[1] quashed the demand raised against the writ petitioner company (respondent herein) towards loss of excise revenue because of destruction of liquor in fire. The appellants have also questioned the order dated 06.11.2019 in C.M. Application No. 90936 of 2019, whereby the High Court directed the appellant No. 2 (Excise Commissioner, Uttar Pradesh[2]) to expeditiously take a final decision on the

3 Hereinafter also referred to as 'the High Court'.
4 Hereinafter also referred to as 'the Excise Commissioner'.

application for refund of the amount that was deposited by the writ petitioner pursuant to the interim order passed in the said writ petition.

4. Before dilating on the issues raised in this case, we may draw a brief outline of the matter to indicate the contours of forthcoming discussion.

3.2. The genesis of the present litigation had been in a fire incident that took place in a godown of the distillery of the respondent company on 10.04.2003. As many as 35,642 cases of Indian Made Foreign Liquor[3] of different brands got destroyed in this fire. After receiving the initial reports that the fire possibly took place due to short circuit of electricity, the department proposed to recover the amount of excise duty lost, due to such destruction of liquor, from the respondent company. The respondent maintained that there was no negligence on its part and, therefore, no case for recovery of the alleged loss of excise duty was made out under Rule 7(11) of the Uttar Pradesh Bottling of Foreign Liquor Rules, 1969[4] and Rule 710 of the Uttar Pradesh Excise Manual[5].

3.3. However, the Excise Commissioner, by his order dated 11.07.2006, rejected the submissions of the respondent and raised a demand to the tune of Rs. 6,39,32,449.44 towards loss of excise revenue on account of destruction of liquor. Accordingly, the District Magistrate, Shahjahanpur asked the respondent to deposit the amount within one week.

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6 'IMFL' for short
7 Hereinafter also referred to as 'the Rules of 1969'.
8 Hereinafter also referred to as 'the Excise Manual'.

3.3. Assailing the demand and recovery steps aforesaid, the respondent-company preferred a writ petition[6] wherein, the High Court, by way of an interim order dated 25.07.2006, stayed the recovery proceedings, subject to the respondent company (writ petitioner) depositing an amount of Rs. 3 crores. A petition seeking special leave to appeal against this interim order was rejected by this Court on 14.08.2006. Thereafter, on 21.08.2006, the respondent company deposited the said amount of Rs. 3 crores with the District Magistrate, Shahjahanpur.

3.4. The writ petition so filed by the respondent company was allowed by the High Court in its impugned order dated 10.04.2017, essentially with findings that Rule 7(11)(a) of the Rules of 1969 was not applicable in the matter because there was no wastage in handling operations of bottling and storage of IMFL; that Rule 709 of the Excise Manual was attracted for which negligence was required to be shown; that the order passed by the Excise Commissioner was based on conjectures and without any cogent evidence about negligence on the part of the writ petitioner; and that the '*incident was nothing but an act of God*. The High Court, accordingly, set aside the impugned orders of demand and recovery towards the alleged loss of excise revenue. Thereafter, for the department having failed to refund the amount deposited pursuant to the interim order in the writ petition, the respondent company moved an application before the High Court whereupon, by the order dated 06.11.2019, the High Court directed

7 Misc. Bench No. 4493 of 2006

the Excise Commissioner to take a decision on the application for refund within four weeks.

3.5. As noticed, the aforesaid orders dated 10.04.2017 and 06.11.2019 passed by the High Court are questioned in these appeals. The appellants maintain that the High Court was not justified in its findings that the incident in question was an act of God and not that of negligence on the part of the respondent. The appellants rely upon Rule 7(11)(a) of the Rules of 1969 and Rules 708 and 709 of the Excise Manual to contend that the respondent company is absolutely liable to pay the excise duty payable on the stock of IMFL destroyed in fire. An ancillary aspect relating to the effect of insurance coverage, only of the value of liquor, and receiving of insurance claim by the respondent company have also been raised. *Per contra*, it submitted that the claim of excise duty in the present case cannot be enforced, for being not authorised by law; and that the respondent is not liable to pay excise duty on the IMFL destroyed in fire, particularly when there was no negligence on its part.

5. The foregoing outline would indicate that the focal point in this case is, as to whether the appellants are entitled to levy, and correspondingly, the respondent is liable to pay, the excise duty on the liquor destroyed in fire? As regards this focal point, three principal questions would require determination, as noticed *infra*.

Relevant factual aspects and background: The fire incident and demand of excise duty on the liquor destroyed

6. Having regard to the questions involved, we may briefly take note of the relevant factual and background aspects, particularly those relating to the functioning of the respondent company and setup of the distillery and godown in question as also the fire incident and the demand of excise duty, leading to the present litigation.

Before the fire

8. The respondent company had been engaged in the business of distillation, bottling and vending of different brands of IMFL. For the purpose of these activities, the respondent was granted license in Form PD-2 to establish and run a distillery for distillation and manufacture of potable alcohol at Distillery Unit Rosa, Shahjahanpur; and was also granted license for wholesale vend of IMFL in Form FL-3 and FL-3A under the Rules of 1969. The respondent company had been functioning at the licensed premises since the year 1994.

9. We need not elaborate on various features of the processes of distillation, bottling and storage but, a few facts placed on record by the parties, relating to the electrical installations and firefighting measures in the premises in question could be usefully noticed.

7.2. On 19.09.2002, the Assistant Electricity Inspector, Government of Uttar Pradesh, Shahjahanpur Zone, Shahjahanpur, after having conducted

a periodical inspection of the said premises of the respondent company, made the following observations pertaining to the electrical installations: -

> "(a) Except the endorsement made herein the relevant rules of Indian Electricity Rules, 1956 was being complied with.
> (c) The details mentioned in the subsequent page are not according to Indian Electricity Rules, 1956
> Hence, in the interest of Safety, you are requested that you should rectify the deficiency by engaging any of the authorized electrician and sent a report within one month after compliance in accordance with the Indian Electricity Rules,1956.
> xxx xxx xxx
>
> Rule 35: It is found that CAUTION place is not placed at certain prominent places. The same should be placed/installed.
> Rule 61(2): At one point of Turbine's Distribution Board Panel, earth wiring has been done with a thin wire. Hence the same should be removed and strip earthing should be done."

(underlining supplied)

In response to the aforesaid, the respondent company stated, in its letter dated 23.09.2002, that the work pointed out in the report had been completed.

7.2. Apart from the above, it appears that certain modification/upgradation work was undertaken at the production plant in the distillery and in that regard, the Excise Inspector, Production Section, Rosa Distillery, Shahjahanpur, in his letter dated 26.12.2002, advised the respondent that electrical and gas wielding jobs be performed carefully with full safety, while ensuring standard methods of fire safety and the required firefighting devices. The said Excise Inspector cautioned the respondent that *"You will be responsible for any loss of revenue/other loss if that occurs due to your carelessness."*

7.3. On 01.03.2003, the office of Fire Brigade Officer, Shahjahanpur issued a No Objection Certificate of Fire Fighting Department for the period between 06.02.2003 to 30.09.2003 after carrying out inspection of the premises in question. In this inspection, the Fire Brigade Officer took note of the fact that different types of fire extinguishers and other firefighting instruments were at the right place and were in working condition, which were refilled by the Chief Engineer of the respondent company. However, a direction was given with regard to the refilling and testing of the instruments; and Foam Installation was also suggested for better firefighting arrangements in the following terms: -

> "You are directed that, in future Fire Fighting Instruments (Fire Extinguisher) should be tested in Fire Station Shahjahanpur before refilling. It is also suggested that, for better management of fire fighting arrangements, Foam Installation should be done in Distillation Plant. With this suggestion, NO objection Certificate of Fire Fighting Department is granted for a period between 06.02.2003 to 30.09.2003, because the said firm has deposited the Testing Fee to the Fire Brigade Department on 06.02.2003."

The fire incident and relevant reports

9. The aforesaid had been the position of record in relation to the electrical installations and firefighting measures in the premises in question. However, on 10.04.2003, a fire incident did take place in a godown of the respondent company, which resulted in 35,642 cases of manufactured IMFL getting destroyed.

8.2. It has been the case of the respondent company that the godown in question was locked for lunch at 12:00 noon on 10.04.2003 under joint lock and key of the Excise Inspector in-charge of the distillery and the

company's representative and at that time, nothing objectionable was noticed and the stocks were in safe condition. However, at about 12:55 p.m., smoke was noticed emitting from the godown. Thereupon, the Excise Inspector in-charge of the distillery was immediately informed and the joint locks were opened; and it was noticed that the stocks of IMFL were on fire. The information about this fire was given to the Police Department and also to the Fire Department and other Excise Authorities. As per the averments and the material on record, it appears that the firefighters could bring the fire under control only by 5:00 a.m. on 11.04.2003.

11. It is borne out that upon receiving information about the incident in question, the Deputy Excise Commissioner, Bareilly, reached the distillery at about 06:30 p.m. on 10.04.2003 and carried out spot inspection with other officers of the department and the Manager Personnel of the respondent company. In his initial report drawn on spot inspection, the said Deputy Excise Commissioner took note of the efforts being made for controlling and dousing the fire as also damage to a substantial quantity of liquor; and also indicated that upon enquiring about the possible reasons of this fire, he was informed that the same took place, probably, due to short circuit in the electricity supply. According to the appellants, even the Station House Officer concerned opined in his investigation report dated 11.04.2003 that the reason for fire was short circuit of electricity.

12. On 13.04.2003, the Fire Brigade Officer of Uttar Pradesh Fire Service also drew up the report about the incident and the efforts made for

controlling the fire. He, however, indicated that the reason of fire was unknown. The relevant part of this report, counter signed by the Deputy Superintendent of Police, as placed on record by the respondent, reads as under: -

> "ON receiving information about Fire, Fire Service Unit rushed to the Place of Incident. On arriving, it was seen that the front part of Godown of Indian Made Foreign Liquor was burning in fire badly, which is situated in Rosa Kothi, M/s Mcdowell Company Ltd. Thana-R.___ , District- Shahjahanpur, and fire was in a horrible, which was being doused by the Staff of M/s Mcdowell & Company Ltd. with the help of available instrument but the fire was out of control for them. After seeing the horrible condition of fire, immediately started the work to control fire by laying two lines in one motor fire engine, immediately thereafter second motor fire engine was brought from Kasba- Tilhar. In dousing the Fire other unit Oswal Chemical Fertilizer and O.C.F. also helped, and after enough hard work, process of dousing was started and after putting the life at risk and after several hours, fire was doused/controlled. On investigation/inspection of fire, it was found that, due to fire, Liquor kept in Go-down was destroyed. Hence, in this fire after adding building and Liquor, in total, according to station officer, approximately a damage worth Rs. 2 crore has been assessed and Rs. 1 crore value of property was saved. Reason of fire was unknown.
>
> Therefore, after finishing the entire work, the fire Service unit returned to the Fire Station after giving instructions that in case again the Fire shows up again, the Fire Station should be informed immediately. We came back to the Fire Station."
>
> (underlining supplied)

12. Another report dated 02.08.2003 was submitted by the Assistant Excise Commissioner, Rosa Distillery, Shahjahanpur to the Excise Commissioner, detailing out the statements of stock of liquor saved as also the stock destroyed in fire and his comments on the cause of fire. The relevant part of this report could be usefully extracted as under: -

"(f) **Cause of Fire :** A detailed enquiry and Investigation was done by me in the distillery after the fire incident. All the Officers mentioned in para (d) have also made inquiries and investigated the matter in detail. All the Investigating Officers have also reached to the conclusion that undisputedly the cause of fire was unknown. During my Investigation and calculation work also, no fact or evidence came to my knowledge, which indicates that there was any negligence either on the part of Distiller or on the part of Excise Staff deputed in the Distillery. It also does not appear that the said incident was deliberately done by any of them. In fact, the Distiller and the Excise Staff have worked jointly with great efficiency and hard work during and after the fire Incident. Thereby ---- stock was saved from the damaged stock.

This fact was confirmed by, Joint Excise Commissioner Investigation dated 30.04.2003, Deputy Excise Commissioner, Bareilly Incharge, Bareilly , investigation dated 10.04.03, Fire Brigade Officer, Investigation report dated 13.04.03 and Station House Officer's Final Report dated 11.04.03, also with copies annexed. In the report of Station House Officer reason of incident is possibly due to short circuit in Electricity. I had also seen the burned cable in debris, but in my opinion Nothing can be confirmed. It can be such an incident, in which reason is Unknown.

On the Distiller level, in the month of December, Instrument according to Fire safety standard, were installed and safety orders were ordered in respect of Letter No. 39/ dated 26.12.02 by the distillery Fire Brigade Officer, Shahjahanpur; Letter No. Memo/F.S./ date 1.03.03, and received the certificate regarding the Instrument in good condition. The Distillery also produced certificate by U.P. Electricity Department, regarding Electricity cabel Establishment.

In accordance, with letter sent by me dated 14.04.03 and 21.04.03 in view of the aforementioned points before the Fire Incident, during the Fire Incident and after that, the calculation of the damaged stock and possible reason of Fire incident was discussed."

(underlining supplied)

Demand of excise duty on the liquor lost in fire

13. In view of the fact that a substantial quantity of the stored liquor got destroyed in the fire and that had the consequence, *inter alia,* of loss of excise revenue, the Excise Department proposed to recover this loss from the respondent company.

12.1. In the first place, on 24.09.2003, a show-cause notice No. 463/CAA/Rosa Distillery/Shahjahanpur was issued by Assistant Excise Commissioner, Rosa distillery to the respondent company seeking explanation regarding the recovery of excise duty in view of Rule 7(11) of the Rules of 1969, as the respondent allegedly failed in its responsibility to keep the stock of liquor safe and secure. In its response letter dated 01.10.2003, the respondent company stated that there was no negligence on its part in regard to the said fire incident; that Rule 7(11) of Rules of 1969 was of no application; and that Rule 709 of the Excise Manual would apply only in case of negligence, which was not proved.

12.2. The Excise Commissioner, however, proposed to recover excise duty from the respondent company and sent a letter dated 27.11.2003 to the Principal Secretary to the Government seeking directions. The said Principal Secretary, in his response letter dated 17.02.2004, stated that the provision regarding imposition of excise duty on the stock of IMFL destroyed in fire was laid down in Rule 709 of the Excise Manual and on the basis thereof, the Excise Commissioner was competent enough to proceed. The Principal Secretary, *inter alia*, stated as under: -

> "Please refer to your letter No. G-43/9-alcohol/Rosa- Fire incident dated 27th November, 2003 regarding directions to be given to the District Magistrate Shahjahanpur with regard to imposition of excise duty on the stock of IMFL destroyed in fire incident dated 10.04.2003 at M/s McDowell & Co. Ltd., Rosa, Shahjahanpur.
>
> 2. In this Connection I have been advised to ask you that the provision regarding imposition of excise duty involved in the stock of IMFL destroyed in the above fire incident at McDowell & Co Ltd., Rosa Shahjahanpur on 10.04.2003 is laid down in

> rule 709 of Excise Manual, on the basis of which you are competent enough to proceed in the matter.
> 3. Your proposal regarding levy of excise duty on the stock of IMFL destroyed in the above fire incident is in Order. Please take necessary steps at the earliest and inform the same to the Government within 15 days."

12.3. Proceeding on the letter so received from the Principal Secretary, the Excise Commissioner, on 23.02.2004, asked the District Magistrate to quantify the excise duty leviable under Rule 7(11) of the Rules of 1969. Having noticed such steps on the part of the authorities, the respondent company remonstrated in its letter dated 08.06.2004 addressed to the Excise Commissioner and requested that the competent authority must first determine as to whether excise duty could at all be levied on IMFL destroyed due to fire before the point of issue of liquor for sale was reached. It was also submitted that the directions may be given only to proceed in terms of Rule 709 of the Excise Manual and not Rule 7(11) of the Rules of 1969. The Excise Commissioner, in his letter dated 12.05.2005, sought a point-wise reply from the respondent company and this letter was replied on 16.05.2005, wherein the respondent company maintained that fire incident was due to the reasons beyond human control and there was no negligence on the part of the company.

12.4. Yet further, the respondent company stated in its letter dated 05.06.2005 that they had a certificate issued by Fire Department, valid up to 03.09.2003; that appropriate fire protection equipments were installed; that electricity safety certificate was also given on 19.09.2002; that MCBs were installed; that there was no material to show that it was an accident

due to negligence on part of the company; and that there was no compulsion to get insurance with respect to excise duty. The aforesaid reply was forwarded by the Excise Commissioner to the Principal Secretary, Excise with his letter dated 29.06.2005. Thereafter, the State Government, in its letter dated 27.12.2005, observed that excise duty on the rates prevailing should be imposed on the respondent company in the interest of revenue.

14. The aforesaid exchange of communications culminated in the impugned order dated 11.07.2006 by the Excise Commissioner, seeking to recover a sum of Rs. 6,39,32,449.44 from the respondent company towards the loss of excise revenue. The Excise Commissioner, *inter alia*, relied upon the inspection reports and held that the respondent was responsible for the safety of the alcohol but failed to ensure such safety; had been careless in not providing fire-proof electric equipments of good quality; and had taken insurance of liquor but not of excise duty. This order dated 11.07.2006, being the bone of contention in the present matter, could be reproduced *in extenso* as under:

> "OFFICE OF EXCISE COMMISSIONER, UTTAR PRADESH, ALLAHABAD
>
> No. 7244/9-Alcohol/131/Rosa/Fire Incident Allahabad Dated – 11.07.2006
>
> **ORDER**
>
> M/s McDowell & Company Ltd., Rosa, District Shahjhanpur is a PD-2 Licensed distillery. The abovementioned distillery has been granted FL-3 and FL 3A license under the Uttar Pradesh Bottling of Foreign Liquor Rules, 1969 and has been doing the bottling of Indian Made Foreign Liquor of their brand and brand of Harbartsons

Ltd. respectively. On 10.04.2003, due to fire incident in the FL-3 and FL3A godown of the distillery, 35,642 (Thirty five thousand six hundred forty two) cases of Indian Made Foreign Liquor of different brands got destroyed. During investigation, it is revealed that the McDowell and company ltd. had taken the insurance of the Indian Made Foreign Liquor kept in the sealed godown. The distillery has also received the claim for that. A Show cause Notice no. 463/CAA/Rosa Distillery/Shahjahanpur dated 24.09.2003 was given to the M/s. McDowell and Company ltd. in relation to the burning of the alcohol kept in the sealed godown. It has been stated by the M/s Mcdowell and Company Ltd. in its explanation dated 01.10.2003 to the abovementioned Show Cause Notice that the fire incident is an act of god and they have no control over this. On 10.04.2003, during the spot inspection conducted by Deputy Excise Commissioner Bareilly, Manager Personnel Shri Anurag Dhawan who was present has stated that possibly fire took place due to short circuit in the electricity supply. The Station officer Shri Ram Chandra Mishan, District Shahjahanpur has stated in his investigation report dated 11.04.2003 that the reason for fire is the short circuit of electricity. The inspection of the M/s McDowell and Company Ltd. was conducted by Joint Excise Commissioner (Task Force) and Deputy Excise Commissioner (Law). It has been found in the inspection that the godown is very old and its repair has also not been done. It is also necessary to mention that M/s Mcdowell and Company Ltd. in the distillery from the time of British period and the distillery & sealed godown has been running in the old building. The roof of the godown was made of asbestos sheet. The short circuit can take place due to old electric wiring in the godown.

In this relation District Officer, Shahjahanpur vide his letter no. 689/OSD/Camp/2004 dated 01.04.2004 has requested for guidance/instruction on the incident. The Excise Commissioner, Uttar Pradesh, vide his letter no. G-43/9-alcohol/Rosa fire incident dated 17.11.2003 has referred this incident to the government in which the government vide letter no. 3763 E-2/13-03 dated 17.02.2004 has directed that the excise duty may be charged on the class of alcohol prevalent at that time on the class of alcohol destroyed and it was also directed that Excise Commissioner is capable to act in this incident.

In perspective to the direction made by Government, the case is that the M/s Mcdowell and Company Ltd., Rosa Shahjhanpur had taken license of FL-3 and FL 3A under UP Bottling of Foreign Liquor Rules, 1969. According to Rule 7 (11) (a) of the abovementioned rules, the licensee is liable to pay excise duty on the wastage of more than 1%. It was responsibility of the license holder to take remedy /precautions for the safety of the alcohol kept in the godown but proper safety of the alcohol kept in the godown was not taken up. The licensee had taken the insurance of the price of alcohol, bottle, label, etc. but insurance of the excise duty imposed on the alcohol was not done. In this way, the licensee has secured his

value of alcohol. The licensee has not suffered any loss in this incident and whatever loss has taken place has been recovered from the insurance. Therefore, perhaps the licensee was careless regarding the electric equipments. The licensee was aware about the terms and conditions while taking license that he is to pay the excise duty on the wastage of stocked alcohol greater than 1 % of the quantity. Inspite of having knowledge, the licensee has not arranged the fire proof electric equipments of good quality due to which questioned incident has taken place. The carelessness taken by the distiller in the safety of the stock of alcohol cannot be considered as Act of God. The license is granted to him under the UP Bottling of Foreign Liquor Rules, 1969. There is provision of charging excise duty on the wastage more than 1 % under Rule 7(11) (a) of those Rules. The Licensee cannot deny the conditions of the license. It has been clearly stated by the Constitution Bench of the Hon'ble Supreme Court in judgment Har Shankar and Anr. Vs. Deputy Excise and Taxation Commissioner and Anr. (1997) 1 SCC 737 that the licensee has taken the license after carefully reading the questioned rules of 1969 and now he cannot wriggle out from the conditions of the license. The licensee has received the license after reading the Uttar Pradesh Bottling of Foreign Liquor Rules 1969 with open eyes, therefore he cannot wriggle out to follow the Rules.

It has been mentioned in Khode Distilleries Ltd. and Ors. vs. State of Karnataka and Ors. (1975) SCC 576 at point (h) "The State can adopt any mode of selling the licences for trade or business with a view to maximize its revenue so long as the method adopted is not discriminatory".

It is clear from the Rule 7(11)(a) of UP Bottling of Foreign Liquor Rules, 1969 are made to secure the revenue. The State has special privilege on manufacturing of liquor, custody, transport, import - export. The State in public interest to increase the revenue strictly monitor the business of alcohol so that neither it can be misused and nor it can cause loss of revenue to be received from it. In respect to the abovementioned according to Rule 7(11)(a) of UP Bottling of Foreign Liquor Rules, 1969, the excise duty of Rs. 6,39,32,449.44/- (Rupees Six Crore Thirty Nine Lakh Thirty Two Thousand Four Hundred Forty Nine and Forty Four Paise Only) is leviable on M/s Mcdowell and Company Ltd., Rosa, district Shahjahanpur as per prevalent rate at the time of incident for year 2003-2004 on different brands of alcohol.

Gejendra Pal
Excise Commissioner
Uttar Pradesh."
(underlining supplied)

13.1 Pursuant to the order so passed by the Excise Commissioner, District Magistrate, Shahjahanpur commenced recovery proceedings and directed the respondent company to deposit the aforesaid sum of Rs. 6,39,32,449.44 within one week.

Writ petition in the High Court and interim order therein

15. Aggrieved by the demand so raised by the Excise Commissioner and the recovery proceedings so adopted by the District Magistrate, the respondent company filed the writ petition, being Misc. Bench No. 4493 of 2006, before the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow, with the following prayers: -

> "i. Issue, a writ order, or direction in the nature of Certiorari calling for the records and quashing the impugned order dated 11th July, 2006 passed by the Excise Commissioner, U.P. and letter dated 17th July, 2006 of the District Magistrate Shahajahanpur, U.P. demanding Rupees 6,39,32,449.44.
>
> v. Issue, a writ order, or direction in the nature of mandamus commanding the respondents not to recover any amount from the petitioner towards the alleged demand with regards to the quantity of Indian Made Foreign Liquor destroyed due to fire accident at Shahjhanpur on 10th April, 2003.
>
> vi. Issue a writ/order or directions in the nature of mandamus declaring Rule 7 (11) of the UP Bottling of Indian Made Foreign Liquor Rules, 1969 as null and void and ultra vires of the UP Excise Act.
>
> vii. Issue a writ/order or directions in the nature of Certiorari calling for the records and quashing the Impugned Order of the State Government which was conveyed through letter dated 17.02.2004 of the Principal Secretary (Excise), Government of UP to Excise Commissioner."

14.1. In the said writ petition, an interim order was passed by the High Court on 25.07.2006 staying the recovery proceedings subject to the

respondent company depositing an amount of Rs. 3 crores with the Excise Commissioner. The respondent company attempted to challenge this interim order dated 25.07.2006 by way of SLP(C) No. 12902 of 2006 but, this Court declined to interfere with the interim order and the special leave petition was dismissed on 14.08.2006. Thereafter, the respondent company deposited the said sum of Rs. 3 crores with the District Magistrate, Shahjahanpur on 21.08.2006. The appellants filed their counter affidavit in the writ petition on 08.09.2006 and the writ petition was finally heard and decided by the High Court by its impugned judgment dated 10.04.2017.

Impugned orders dated 10.04.2017 and 06.11.2019: High Court allowed the writ petition and passed consequential orders

16. The High Court, in its impugned order dated 10.04.2017, after taking note of the aforesaid background aspects as also the Rules of 1969 and the Excise Manual, in the first place noted the fact that though the validity of Rule 7(11) of Rules of 1969 was questioned in the writ petition but while arguing the matter, learned counsel for the company confined his challenge to the impugned orders of recovery of excise duty essentially on the grounds that the company could have been held guilty only if there was any negligence on its part in causing loss of excise revenue but, in the present case, there was no negligence on the part of the company; and that it was an act of God and, therefore, no liability could be imposed on the company. The High Court observed that Rule 7(11)(a) of the Rules of

1969, dealing with wastage, in the operation of bottling and storage of IMFL was of no application because in the present case, there was no wastage in handling operations of bottling and storage but there was loss of spirit due to fire. The High Court pointed out that Rule 709 of the Excise Manual would apply and in that regard, if the company was shown to have caused loss to excise duty on account of any negligence, it would be liable to make good the loss. The High Court, *inter alia,* observed as under: -

> "26. Rule 7(11)(a) of Rules, 1969 talks of wastage which occurred in the operation of bottling & storage of IMFL, but here is not a case where there is any wastage in handling operations of bottling & stor-age of IMFL but there is total loss of spirit due to fire and this in turn has caused loss to excise duty.
>
> 28. In our view, it is Rule, 709 of U.P. Excise Manual which applies and if petitioner can be shown to have caused loss to excise duty on account of any negligence, it is liable to make good the said loss. The condition precedent, therefore, is the factum of "negligence" on the part of petitioner. We have no manner of doubt that in the pre-sent case Rule 7(11)(a) of Rules, 1969 has no application and it is Rule 709 of U.P. Excise Manual which is attracted."

17. The High Court, thereafter, proceeded to analyse the impugned order dated 11.07.2006 and observed that the inferences drawn therein were lacking in material foundation and were only of conjectures and surmises. The High Court found that there was no apparent negligence on the part of the company and also recorded its conclusion that the incident was nothing but an act of God. The High Court further observed that negligence being the condition precedent for the fiscal liability in question, no such liability could be fixed unless negligence was found on the basis of some material; and held that in absence of any material to show that the

loss was caused on account of any negligence on the part of the company, the demand in question was wholly illegal and unsustainable. The High Court proceeded to set aside the demand in question with the following observations and findings: -

> "29. In order to hold petitioner guilty of negligence, ECUP vide impugned order dated 11.7.2006 while admitting that police officials as well as joint inspection report, possible reason has been given as "short circuit" from electrical supply, but having said so, it has further said that (i) godown is very old and has not been properly repaired; (ii) Distillery is of British period, Distillery and Warehouse both are running in old buildings; (iii) roof of godown is made of abestos sheets and there is possibility of short circuit due to old electrical wire in the godown; (iv) Insurance of excise duty was not obtained, though spirit was insured; (v) licensee was probably neg-ligent in maintenance of electrical equipments; (vi) licensee did not insure electrical equipments; (vii) fire proof of electrical equipments were not of good quality, and this resulted in the incident. Therefore, it is not an act of God. When we asked from learned counsel for respondents as to wherefrom respondents got information that fire equipments were not of good quality and have caused incident or that Distillery was negligent in maintenance of electrical equiments, he could not point out any material on record, wherefrom the afore-said inference drawn by ECUP could have been substantiated or to be justified. In fact, the aforesaid inference is nothing but conjec-tures and surmises on part of ECUP without having any material foundation.
>
> 33. On the contrary, various authorities from time to time, who have visited site, have clearly reported that there was no apparent negligence on the part of petitioner. The incident was nothing but an act of God. When a fiscal liability is founded on certain condition precedent, i.e. "negligent" on the part of the person whom we have to hold responsible, then no responsibility can be fixed unless such negligence is shown to be founded on the basis of some material. Factum that building was old or the wirings were old have pointed out to be dangerous or prone to fire either by Electricity Department or Fire Department or even by Excise Authorities, who were In charge of bonded Distillery, storage and godown.
>
> 34. Further, electrical equipments installed at the Distillery were not of good quality is also conjectures and surmises as no material was shown to fortify the same. In absence of any material to show that loss was caused on account of any negligence on the part of petitioner, we find that demand made in this writ petition is wholly illegal and cannot sustain.
>
> 35. The writ petition is accordingly allowed. Impugned orders dated

11.7.2006 and 17.7.2006 are hereby set aside. No costs."

(underlining supplied)

18. After the decision aforesaid, the respondent company sought directions for refund/adjustment of the sum of Rs. 3 crores deposited in compliance of the interim order. The said application, being C.M. No. 90936 of 2019, was considered and allowed by the High Court by its order dated 06.11.2019 requiring the Excise Commissioner to decide the application moved by the company while keeping in view of the fact that the money was deposited pursuant to the interim order and subsequently, the writ petition was allowed.

Rival submissions

19. While assailing the orders passed by the High Court, learned counsel for the appellants has advanced essentially two-fold contentions: one, that it had been clearly a case of negligence on the part of the respondent company where the fire incident cannot be termed as an act of God; and second, that as per the applicable provisions of U.P. Excise Act, 1910[7], the Excise Manual and the Rules of 1969, the demand of excise duty on the liquor lost in fire has rightly been raised. The learned counsel has also addressed the Court on another facet of the case, as regards the effect of insurance claim received by the respondent company towards the cost of IMFL destroyed in fire.

8 Hereinafter also referred to as 'the Act of 1910'.

20. Learned counsel has submitted that an act of God is an inevitable, unpredictable and unreasonably severe event caused by natural forces without any human interference, such as earthquake, lightning, flood etc.; it is a natural hazard outside the human control for which, no person could be held responsible. It is submitted that for the fire in distillery to be an act of God, there must have been some such incident like earthquake or lightning but no such natural forces were in operation at the time of the incident; and this incident cannot be attributed to any such force of nature but only to some human fault. Learned counsel would submit that when operation of natural forces is ruled out and the incident had, in fact, taken place, it would obviously be referred to the elements of negligence on the part of the respondent company. The learned counsel has elaborated on the submissions that negligence is a specific tort and essentially refers to a failure to exercise that care which circumstances demand. To support the contentions that the present one has not been an act of God, learned counsel has referred to and relied upon the decisions in ***Divisional Controller, KSRTC*** **v.** ***Mahadeva Shetty and Ors.*****: (2003) 7 SCC 197,** ***Vohra Sadikbhai Rajakbhai & Ors.*** **v.** ***State of Gujarat and Ors*****: (2016) 12 SCC 1** and ***Patel Roadways Limited*** **v.** ***Birla Yamaha Limited*****: (2000) 4 SCC 91.**

19.1. Learned counsel for the appellants would submit that the incident of fire in the present case, on account of short-circuit in the godown storing large quantity of highly inflammable IMFL, was clearly an incident which

was avoidable, if proper and necessary care was taken by the respondent company. It is submitted that distilleries are even otherwise susceptible to fire due to large amount of alcoholic vapour being in the air and the respondent company was required to take all care and precautions to avoid any such incident. With reference to the inspection reports, learned counsel has contended that even before the incident in question, the defects and deficiencies in electrical installations and wiring had been indicated and when the incident of fire took place due to short-circuit, the company cannot avoid its liability by merely suggesting that they had followed all preventive measures or had taken a certificate from the Fire Department.

22. As regards the entitlement of appellants to demand and recover the excise duty on IMFL lost in fire and corresponding liability of the respondent company to make such payment, learned counsel for the appellants has made elaborate reference to the relevant statutory provisions and has submitted that the demand in question has been squarely in conformity with law and deserves to be upheld.

23. With reference to entries 8 and 51 of List II of the Seventh Schedule to the Constitution of India, learned counsel would submit that the entire field of legislation on the subject relating to intoxicating liquors as also the matters concerning duties of excise and countervailing duties is in the domain of the State legislature; and for the present purpose, the matter is governed by the provisions contained in the Act of 1910, the Excise Manual and the Rules of 1969. With reference to Sections 17, 18, 19, 28, 29 and

30 of the Act of 1910 the learned counsel has submitted that no intoxicant can be manufactured and no liquor can be bottled for sale except under the authority and subject to the terms and conditions of a licence granted in that behalf (Section 17); and, as per Section 18, the Excise Commissioner may grant a licence for establishment of distillery and warehouse in which spirit may be manufactured under a licence granted under Section 17. Further, as per Section 19, no intoxicant can be removed from any distillery, brewery, warehouse or the place of storage, unless duty has been paid or a bond has been executed for payment thereof. It is thus submitted that the condition precedent for removal of any intoxicant is actual payment of the duty payable or execution of bond for such payment. Learned counsel has referred to the bond executed in favour of the Governor of Uttar Pradesh by the respondent for bottling of IMFL and has submitted that the licencee has been under obligation to observe all the provisions of the Act of 1910 and the rules made thereunder.

21.1 The learned counsel would submit that the distillery having been established under PD-2 licence, the respondent was under obligation to follow the terms and conditions of the licence and correspondingly, has always been under obligation to deposit the duty demanded under the provisions of the Act of 1910, particularly when all the operations, including that of transfer of the liquor from PD-2 licensed area to the bottling hall and to the godown and then, dispatch are covered by the terms of licence and the bond executed by the distiller. Yet further, learned counsel would

submit that in terms of Rule 7(11) (a) of the Rules of 1969, the respondent company was responsible for payment of duty on wastage in excess of 1 per cent and cannot avoid this obligation. With reference to Rule 813 of the Excise Manual, the learned counsel has submitted that in terms thereof, free wastage allowance for different kinds of spirits stored in a distillery is provided but with the specific exclusion of bottled spirit; and it is clear that once the spirit is bottled and stored, the licencee remains liable to make payment of excise duty in case of wastage of bottled spirit in terms of Rule 7(11)(a) of the Rules of 1969 read with Rule 709 of Excise Manual. With reference to the decision of this Court in the case of ***Har Shankar and Others v. Deputy Excise & Taxation Commissioner and Others:*** **(1975) 1 SCC 737**, the learned counsel would submit that when the licencee has taken the licence after carefully reading the Rules of 1969, it cannot wriggle out of the conditions of licence.

23. On the question as to when IMFL became exigible to excise duty, learned counsel has contended that in the scheme of the Act of 1910 and Rules thereunder, excise duty is leviable right from the point of entry of spirit into the distillery for manufacturing of alcohol and on every point including the points of blending, manufacturing and bottling; and thereafter on the bottled spirit. It is thus contended that the respondent company is incorrect in its assertion that the goods having been destroyed in the godown, excise duty did not become leviable. It is submitted that the

moment spirit has been stored in the bottle, excise duty is leviable on the bottle, even if the same is not taken out of the warehouse.

22.1. With reference to Sections 28 and 29 of the Act of 1910, learned counsel would submit that these provisions, respectively empowering the State to impose excise duty and providing for the manner in which the duty is to be levied, clearly show that the excise duty, which in real terms is price of exclusive privilege of the State, may be imposed on the liquor manufactured in the distillery and it is wrong to contend that excise duty cannot be levied on bottled spirits or is liable to be quantified and collected only at the point of issuance of liquor from godown. Learned counsel has particularly referred to the decision of this Court in the case of ***State of U.P. and Others v. M/s Modi Distillery Etc.:*** **(1995) 5 SCC 753,** as regards various features of the demand of excise duty at different stages and different events. The learned counsel has also referred to the decision in the case of ***State of U.P. and Ors. v. M/s Mohan Meakin Brewery Ltd. and Anr.:*** **(2011) 13 SCC 588**.

24. As regards another facet of the stand of respondent that there being regular deployment of the staff of Excise Department at the distillery; the entire operation being under the control and supervision of the Excise Department; the bonded warehouse being always under the joint lock of Excise Department and the respondent; and liquor being issued only upon the Excise Inspector opening the department's lock, learned counsel would submit that such deployment of Excise Officers is necessary to ensure the

implementation of the rules and to safeguard the revenue interests of the State but for the matter, the safety and security of the distillery and prevention of any mishap by proper maintenance of the building and installations cannot be shifted on the Excise Department; and such safety and security had been the sole responsibility of the licencee. Thus, according to the learned counsel, for the fire incident in question, which could only be attributed to want of proper maintenance and upkeep of installations and/or equipment, the respondent company alone remains liable and responsible.

25. In another limb of submissions, learned counsel has referred to the fact that the respondent company had taken insurance coverage of the value of liquor and hence, was compensated by the insurer. The learned counsel has contended that when the respondent company got reimbursement of value of liquor from the insurance company, the event was akin to that of the sale of liquor; and on the principles of equity and fair play, the State cannot be put to loss in the manner that even when the distiller has received value of liquor, the corresponding excise duty would not be made available to the State. The learned counsel has also contended that omission on the part of the respondent company to take insurance coverage of the value of excise duty, while taking insurance coverage of the value of the liquor, itself amounts to negligence on the part of the respondent and for this reason too, the respondent is liable to make payment of the excise duty on the value of liquor recovered from the

insurance company. In support of these contentions, the learned counsel has referred to an order passed by the Customs, Excise and Service Tax Appellate Tribunal, Northern Bench, New Delhi[8] in the case of ***Dharampal Satyapal v. Commissioner of Central Excise, Noida:*** **(2004) 167 ELT 291**, wherein remission of duty on account of damage of goods (*pan masala*) in rain water was disallowed, when it was found that the assessee had been compensated by the insurance company with an amount which was much more than the duty involved.

26. *Per contra*, the learned counsel for the respondent has supported the order passed by the High Court allowing the writ petition and has contended that there had not been any negligence on the part of the respondent company in relation to the incident of fire and no liability could be fastened on it towards excise duty on the liquor destroyed in fire. This apart, the learned counsel would contend, with reference to Article 265 of the Constitution of India, that levy and collection of tax must be authorized by law and in the scheme of the Act of 1910, the Excise Manual and the Rules of 1969, the excise duty could have been collected only at the point of issuance of IMFL from distillery and there was no question of demand of excise duty on the stock of IMFL destroyed due to fire in the godown. The learned counsel has also submitted that in regard to the stock of IMFL destroyed in fire, there was no transfer of property to anyone else and therefore, there was no sale so as to occasion recovery of excise duty.

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9 'CESTAT' for short

27. While asserting that the respondent had taken all precautions of safe maintenance/storage of the stock of IMFL in the godown of distillery, learned counsel has submitted that the fire extinguishing equipments were installed in the distillery premises and the Fire Department issued No Objection Certificate dated 01.03.2003 on being fully satisfied with the precautions taken by the distillery in respect of the safety against fire; that the Assistant Electrical Inspector issued the certificate dated 19.09.2002 after inspection and on being satisfied that the electrical wiring equipments etc. were in accordance with Indian Electricity Act, 1966; that the distillery had obtained license to work on 06.10.1994 which was renewed annually and was valid on the date of incident; that it was specifically stated in the report of the Assistant Excise Commissioner dated 02.08.2003 that the cause of fire could not be ascertained and there was nothing to show that distillery was, in any manner, negligent or had caused the fire deliberately; that even in the report submitted by the police department, it was stated that the cause of fire could not be ascertained and there was absolutely no mention of any negligence on the part of the respondent; that in the report of the Fire Department too, it was pointed out that the cause of fire could not be ascertained; that the District Magistrate, Shahjahanpur, in his letter dated 21.10.2003 to the Principal Secretary(Excise) similarly stated that the reason of fire was unknown and there was no proof with regard to the negligence of distillery. With these facts and factors, learned counsel for the respondent would submit that the fire incident due to which IMFL got

destroyed was not caused by any negligence of the respondent and coupled with this remains the fact that complete control and supervision of the distillery was exercised by the State Excise Department. Thus, according to the learned counsel, there being no negligence on the part of the respondent, no liability of excise duty on the liquor destroyed in fire could be fastened on it.

28. While maintaining that there was no negligence on the part of the respondent, the learned counsel has assailed the legality and validity of the demand of duty against the respondent. In this regard, learned counsel has referred to Article 265 of the Constitution of India, the provisions of the Act of 1910 and the Rules thereunder as also the Excise Manual and has submitted that Rule 708 of the Excise Manual absolves the State Government from the responsibility for the destruction, loss or damage of any spirit stored in distillery by fire or theft or by gauging or proof or by any other cause, for the reason that the entire distillery (including godown) is under the lock and key of Excise Department. Learned counsel has referred to Rule 709 of the Excise Manual to submit that in the event of loss, the distilleries are made liable to make good any loss of revenue to the Government only in the event of such loss having been caused due to their negligence. Learned counsel has emphatically argued that in terms of Rule 709, if a distillery has not been negligent in safe custody of the stock of spirit, it cannot be held liable to make payment towards loss of excise

duty, if any, due to accident or reasons beyond the control of human agency.

27.1 Yet further, learned counsel has submitted that entire bottling operations including the storage of bottled liquor are done under the strict supervision of the Excise Inspector and the stocks are maintained in separate rooms under joint lock and key of the department and the company. With reference to the Rules of 1969, particularly Rule 7 thereof, the learned counsel would submit that the stock so maintained under the joint lock and key is issued for the purpose of export outside the state of UP or for the purpose of wholesale vend within the state of UP; and it is only at the point of issuance of liquor from the bottling rooms/godowns when the excise duty is liable to be quantified and collected with reference to the date, time and place of issuance. In this regard, learned counsel has also referred to the provisions contained in Sections 28 and 29 of the Act of 1910 and has re-emphasised that in exercise of powers thereunder, the State Government has chosen the point of issue for sale as being the point for quantification, calculation and collection of excise duty under its notification dated 30.03.1962 which makes it clear that the rate of duty is linked to the point of time to the date of issue for sale and not to the date of manufacture. Learned counsel would submit that IMFL in question having been destroyed on account of fire before its issuance from the godown for sale, there arise no question of collecting any excise duty on the said destroyed stock of IMFL. Learned counsel has further submitted

that under the Excise Act though the duty is levied at the point of manufacture but the point of collection of the duty is only at the time of issuance for sale and hence, to cover the eventuality in between post-manufacturing and before sale, Rule 7(11) of the Rules 1969 allows 1% of wastage and mandates to charge full rate if wastage occurs beyond 1%; and in case of destruction or loss due to fire or theft etc., the distillery is made liable for loss of revenue only if there is negligence on its part. Thus, according to the learned counsel, in the present case, where the liquor had not been issued from the godown for sale and had not been lost due to any negligence on the part of distiller, the levy of excise duty deserves to be disapproved, for being not the one authorized by law and being hit by the requirements of Article 265 of the Constitution of India. Learned counsel has referred to the decision in ***Somaiya Organic (India) Pvt. Ltd. and Anr.***

v. *State of U.P. and Anr.*: (2001) 5 SCC 519 to submit that both the levy and collection of tax must be authorised by law. According to the learned counsel, the High Court has correctly held that Rule 709 of the Excise Manual would be applicable and no duty could be imposed on the respondent as there was no negligence on its part.

29. As regards the effect of insurance and reimbursement of the value of IMFL by the insurance company, learned counsel has referred to the definition of sale in the Sale of Goods Act, 1930 as also in the U.P. Trade Tax Act, 1948, and has submitted that in the stock of IMFL destroyed due to fire, neither there was any transfer of property nor there was a sale; and

the claim received from the insurer on account of loss of goods in a fire cannot be termed as consideration. It is also submitted that not taking insurance cover for the excise duty was an irrelevant and immaterial fact because liability to pay excise duty would have arisen only when there was negligence on the part of the respondent company and not otherwise. The learned counsel has also submitted that in fact, the insurance company itself would not have cleared the insurance claim if there was any negligence on the part of the respondent and clearance of insurance claim itself fortifies that there was no negligence on the part of the respondent. It is also submitted that the respondent company had not earned any profit in the matter and in fact, it pays the excise duty when the same is recovered from the ultimate consumer but in the present case, when the respondent did not pass on and did not recover excise duty from any consumer, the question of levying the same on the respondent does not arise.

30. We have heard learned counsel for the parties at sufficient length and have examined the material placed on record with reference to the law applicable

Questions for determination

31. In view of rival submissions, the following three major questions arise for determination in this case:

D. As to whether demand of excise duty on the liquor lost in fire is authorised by law and has rightly been raised as per the applicable provisions of the Act of 1910, the Excise Manual and the Rules of 1969?

E. As to whether the fire incident in question had been an event beyond human control and no negligence could be imputed on the respondent company?

F. What would be the effect of the fact that the respondent company had taken insurance coverage only of the value of liquor (and not that of excise duty thereupon) and then, had received the insurance claim towards the value of liquor?

Relevant statutory provisions

33. Having regard to the questions involved, we may take note of the constitutional and statutory provisions, which do carry their own relevance in the present case.

34. The fundamental constitutional mandate that no tax shall be levied or collected except by authority of law is contained in Article 265 of the Constitution of India, which reads as under: -

> "**265. Taxes not to be imposed save by authority of law**.- No tax shall be levied or collected except by authority of law."

32.1. The relevant Entries 8 and 51 in List II (State List) of the Seventh Schedule to the Constitution of India could also be usefully reproduced as under: -

> "8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors.

> 52. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India: -
> (a) alcoholic liquors for human consumption;
> (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

34. The law relating to intoxicating liquors and intoxicating drugs in the State of Uttar Pradesh is principally governed by the provisions contained in the U.P. Excise Act, 1910. A few of the relevant definitions contained in Section 3 as also the relevant provisions, which are of direct bearing in the present case, as contained in Sections 17, 18, 19, 28 and 29 read as under:-

> 3. **Interpretation.-** In this Act, unless there is something repugnant in this subject or context -
> (2) "excise revenue" means revenue derived or derivable from any duty, fee, tax, fine (other than a fine imposed by a court of law), or confiscation imposed or ordered under the provisions of this Act, or of any other law for the time being in force relating to liquor or intoxicating drugs;
> *** *** ***
> (3*a*) "excise duty" and "countervailing duty" means any such excise duty or countervailing duty, as the case may be, as is mentioned in entry 51 of List II in the Seventh Schedule to the Constitution;
> *** *** ***
> (9) "spirit" means any liquor containing alcohol obtained by distillation, whether it is denatured or not;
> *** *** ***
> (12) "liquor" means intoxicating liquor and includes spirits of wine, spirit, wine, tari, pachwai, beer and all liquid consisting of or containing alcohol, also any substance which the State Government may by notification declare to be liquor for the purposes of this Act;
> *** *** ***
> (22-*a*) "excisable article" means -
> (*a*) any alcoholic liquor for human consumption; or
> (*b*) any intoxicating drug;
>
> ***** *** *****

19. Manufacture of intoxicants prohibited except under the provisions of this Act. - (1) (*a*) No intoxicant shall be manufactured;

(b) no hemp plant *(cannabis sativa)* shall be cultivated;

(c) no portion of the hemp plant *(cannabis sativa)* from which any intoxicating drug can be manufactured shall be collected;

(d) no liquor shall be bottled for sale; and

(e) no person shall use, keep or have in his possession any materials, still, utensil, implement or apparatus whatsoever for the purpose of manufacturing any intoxicant other than *tari*.

Except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Collector.

(2) No distillery or brewery or manufactory shall be constructed or worked except under the authority and subject to the terms and conditions of a licence granted in that behalf by the Excise Commissioner under Section 18.

20. Establishment or licensing of distilleries and warehouses.-The Excise Commissioner may-

(*a*) establish a distillery in which spirit may be manufactured under a licence granted under Section 17 on such conditions as the State Government deems fit to impose;

(b) discontinue any distillery so established;

(c) licence, on such conditions as the State Government deems fit to impose the construction and working of a distillery or brewery or manufactory;

(d) establish or licence a warehouse wherein any intoxicant may be deposited and kept without payment of duty; and

(f) discontinue any warehouse so established.

20. Removal of intoxicants from distillery, etc.- No intoxicant shall be removed from any distillery, brewery, manufactory, warehouse or other place of storage established under this Act unless the duty (if any) payable under Chapter V has been paid or a bond has been executed for the payment thereof.

***** *** *****

29. Duty on excisable articles – (1) 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 in accordance with the provisions of Section 12(1); or

(b) exported in accordance with the provisions of Section 13; or

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted under Section 17; or

(f) manufactured in any distillery established, or any distillery or brewery licensed, under Section 18 :

(ii) duty shall not be so imposed on any article which has been imported into India and was liable on such importation to duty under the Indian Tariff Act, 1894, or the Sea Customs Act, 1887.

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.

(3) The State Government shall, in imposing an Excise duty or a countervailing duty as aforesaid and in fixing its rate, be guided by the directive principles specified in Article 47 of the Constitution of India.

"**29. Manner in which duty may be levied.-**Subject to such rules as the Excise Commissioner may prescribe to regulate the time, place and manner of payment, such duty may be levied in one or more of the following ways as the State Government may by notification direct :

(f) In the case of excisable articles imported under Section 12 (1)-

(i) by payment either in the province of import or in the province or territory of export; or

(ii) by payment upon issue for sale from a warehouse established or licensed under Section 18 *(d)*;

(g) in the case of excisable articles exported under Section 13-by payment either in the province of export or in the province or territory of import ;

(h) in the case of excisable articles transported-

(i) by payment in the district from which the excisable article is to be transported or

(ii) by payment upon issue for sale from a warehouse established or licensed under Section 18 *(d)* ;

(i) in the case of intoxicating drugs manufactured under any licence granted under Section 17 (1) -

(i) by a rate charged upon the quantity manufactured under a licence granted under the provisions of Section 17 (1) *(a)*, or issued from a warehouse established or licensed under Section 18 *(d)* ;

(ii) where the intoxicating drug is manufactured from hemp plant *(cannabis sativa)* cultivated or collected under a licence granted under the provisions of Section 17 (1) *(b)* and *(c)*, by an acreage rate levied on the cultivation, or by a rate charged upon the amount collected ;

(j) in the case of spirit or beer manufactured in any distillery estab-lished or any distillery brewery or manufactory licensed under Sec-tion 18-

(i) by a rate charged upon the quantity produced or issued from the distillery brewery or manufactory, as the case may

be, or issued from a warehouse established or licensed under Section 18 *(d)* ;

(iii) by a rate charged 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 :

Provided that, where payment is made upon issue of an excisable article for sale from a warehouse established or licensed under Section 18*(d)*, it shall be at the rate of duty which is in force on the article on the date when it is issued from the warehouse."

35. Rules 708, 709 and 813 of the Excise Manual, dealing with the issues pertaining to loss of spirit in distilleries and wastage allowance, read as under: -

"708. Government not liable for loss, of spirit in distilleries. - Government shall not be liable for the destruction, loss or damage of any spirit stored in distilleries by fire or theft, or by gauging, or proof, or by any other cause whatsoever. In case of fire or other accident officers in-charge of distilleries shall immediately attend, to open the premises at any hour by day or nights.

710. Distillers responsible for loss etc. of spirit in distilleries. - Distillers shall be responsible for the safe custody of stock of spirit in their distilleries and shall be liable to make good any loss of revenue caused to Government by their negligence.

*** *** ***

814. Wastage allowance. – The free wastage allowances for different kinds of spirit (excluding bottled spirit) stored in a distillery shall be as follows:

	Per cent
(1) Plain and spiced spirit … …	0.7
(2) Rectified spirit and Sophisticated spirit …	0.4
(3) Denatured spirit … …	0.5

If the total wastage on any kind of spirit does not exceed 3 per cent duty will be charged on the net wastage in excess of the free allowances. But if the total wastage exceeds 1.5 per cent duty shall be liable to be charged on the whole wastage without allowing for the free allowances at the following rates :

(4) *Plain and rectified sprits.* - At the highest rate of duty leviable on country spirit in the case of plain spirit and at the highest rate of duty leviable on I.M.F.L., in the case of Rectified sprit.

(5) *Sophisticated spirits including spiced Country spirit.* - At the rate of duty leviable on that spirit.

(6) *Denatured spirit.* - A penalty at the highest rate of purchase tax leviable on such spirit :

Provided that if it is proved to the satisfaction of the Excise Commissioner that the deficiency or wastage in excess of the prescribed limit has been caused by an accident or other unavoidable cause, the payment of duty on such deficiency or wastage shall be not be required.

When the wastage does not exceed the prescribed limit, no action need be taken by the officer-incharge, but when an excess is found in any case at the time of monthly stock-taking, the officer incharge must obtain a written explanation from the distillers and forward the same together with a full report of the circumstances to the Assistant Excise Commissioner/Deputy Excise Commissioner. The Assistant Excise Commissioner/Deputy Excise Commissioner shall charge the duty on excess wastage if he is satisfied that the wastage in excess of the prescribed limit is not on account of an accident or any unavoidable cause. In case the excess wastage is due to an accident or unavoidable cause, the matter will be referred to the Excise Commissioner for orders."

36. One major activity concerning one of the intoxicating liquors, namely, bottling and storage of foreign liquor, is regulated in the State of Uttar Pradesh by the Rules of 1969 which, *inter alia*, provide for grant of bottling licence in Form FL-3 to a distiller to bottle spirits; to a brewer to bottle beer; and to a vintner to bottle wines. Various general conditions of such a licence are contained in Rule 6 of these Rules and then, additional special conditions in relation to bottling of IMFL in bond under FL-3 licence are contained in Rule 7. Elaborate provisions have been made in Rule 7 concerning the actual operations of bottling and storage as also supervision thereof. For the present purpose, only sub-clause (11) of Rule

7 needs to be noticed and the same is reproduced hereunder (while omitting other sub-clauses, being not relevant): -

> "7. Following additional special conditions will be applicable to bottling of Indian Made Foreign Liquor in bond under F.L.-3 licence :
> *** *** ***
> (12) (a) An allowance up to one per cent. may be made on the total quantity of spirit stored during a month for actual loss in bottling and storage. The licensee shall be responsible for the payment of duty on wastage in excess of one per cent.
> (b) When the wastage does not exceed the prescribed limit, no action need be taken by the Excise Inspector incharge but if an excess is found at the time of monthly stock taking the Excise Inspector shall submit a statement to the Collector by fifth day of the month in Form F.L.B.-10 showing the quantity of actual wastage and the duty to be paid by the licensee on the excess wastage. On receipt of the statement, the Collector shall recover the duty from the licensee at the full rate of duty leviable on Indian made foreign spirit.
> *** *** ***"

37. Before proceeding further we may, at once, summarise that IMFL destroyed in fire in this case undoubtedly answered to the description of "spirit", "liquor" and "excisable article" within the meaning of Clauses (8), (12) and (22-*a*) of Section 3 of the Act of 1910, for being an intoxicating liquor containing alcohol obtained by distillation; and the same was manufactured under a licence granted in terms of Section 17 in the distillery of the respondent and was kept in the warehouse established in terms of Section 18 of the Act of 1910. Thus, this liquor (IMFL) could not have been removed from the place of storage unless excise duty payable thereupon had been paid or a bond was executed for the payment thereof. The duty was payable in terms of Section 28 and its rate was to be that as applicable on the date of its issue from the warehouse in terms of Section 29. An allowance upto 1% was admissible on the total quantity of liquor stored

during a month for actual loss in bottling and storage and else, no wastage allowance as such was admissible thereupon. Moreover, the Government was not to be liable for any loss in the quantity of this stored liquor for whatever reason; and on the other hand, the distillery, i.e., the respondent was to be responsible for the safe custody thereof and also liable to make good any loss of revenue including owing to any loss during storage beyond permissible one per cent of the total quantity. Considering that mandate, the respondent was solely liable for payment of excise duty on wastage of stored total quantity with allowance only upto one per cent, as specified. While keeping in view these salient features emerging from a combined reading of the above quoted provisions of the Act of 1910, the Excise Manual and the Rules of 1969, we may take up the questions calling for determination in this case.

Whether the demand in question is authorised by law?

38. With reference to the provisions above-mentioned, the main plank of submissions on behalf of the respondent company has been that the point of quantification and calculation of excise duty being the point of issue from the bonded warehouse and that point/stage having not reached in relation to the liquor destroyed in fire, the question of demand of excise duty would not arise. It has also been submitted that Rule 7(11) of the Rules of 1969 has no application and only Rule 709 of the Excise Manual could apply for which, negligence on the part of the distillery is required to be

proved. Before taking up the issue relating to the applicable rule, we may

deal with the fundamental question raised on behalf of the respondent, i.e., as to whether the demand is unauthorised for the reason that the point/stage of quantification and calculation of duty had not reached and liquor got destroyed while lying in warehouse.

40. As noticed, such an argument, that the demand of duty remains unauthorised for the point of issue of liquor having not reached, was not raised as such before the High Court nor the High Court had proceeded on that basis. Be that as it may, the submission even otherwise remains untenable and is required to be rejected.

41. It remains a fundamental constitutional mandate, and needs no elaboration, that in terms of Article 265 of the Constitution, both levy and collection of tax must be authorised by law, as held by this Court in the case of ***Somaiya Organics*** (supra). It remains equally trite that by virtue of Entry 51 of List II, the State has been authorised to impose duty of excise on alcoholic liquors for human consumption manufactured or produced in the State. The question raised on behalf of the respondent company, about the authority of the appellant-State to levy excise duty on the liquor in question that was destroyed in fire and had not reached the point of issue, could be adequately answered with reference to the principles concerning the event and the point where entitlement of the State to levy excise duty, and corresponding liability of the respondent to make payment thereof, comes into existence.

39.1. In the case of ***State of U.P. & Ors. v. Delhi Cloth Mills & Anr.:*** **(1991) 1 SCC 454,** this Court dealt with the question as to whether excise duty could have been levied on the wastage of liquor in transit and held that the levy of differential duty, which was charged upon reporting of excess wastage, did not cease to be an excise duty even if it was levied upon declaration of excess wastage because*, 'the taxable event* was *production or manufacture of liquor*.' This Court further made it clear that the excise duty remained a single point duty which could be levied at one of the points mentioned in Section 28 of the Act of 1910. The relevant observations and declaration of law by this Court could be usefully reproduced as under: -

> "8. The original Section 28 of the Act now re-numbered as sub-section (1) thereof, and sub-sections (2) and (3) inserted by Section 2 of the U.P. Act 7 of 1970 clearly covers Indian made foreign liquors. There can be no dispute as to military rum being one of the Indian made foreign liquors excisable under the Act. A duty of excise under Section 28 is primarily levied upon a manufacturer or producer in respect of the excisable commodity manufactured or produced irrespective of its sale. Firstly, it is a duty upon excisable goods, not upon sale or proceeds of sale of the goods. It is related to production or manufacture of excisable goods. The taxable event is the production or manufacture of the liquor. Secondly, as was held in *A.B. Abdulkadir v. State of Kerala*: AIR 1962 SC 922, an excise duty imposed on the manufacture and production of excisable goods does not cease to be so merely because the duly is levied at a stage subsequent to manufacture or production. That was a case on Central Excise, but the principle is equally applicable here. It does not cease to be excise duty because it is collected at the stage of issue of the liquor out of the distillery or at the subsequent stage of declaration of excess wastage. Legislative competence under entry 51 of List II on levy of excise duty relates only to goods manufactured or produced in the State as was held in *Bimal Chandra Banerjee v. State of M.P.:* 1970 (2) SCC 467. In the instant case there is no dispute that the military rum exported was produced in the State of U.P. In *State of Mysore v. D. Cawasji &Co.:* 1970 (3) SCC 710, which was on Mysore Excise Act, it was held that the excise duty must be closely related to production or

> manufacture of excisable goods and it did not matter if the levy was made not at the moment of production or manufacture but at a later stage and even if it was collected from retailer. The differential duty in the instant case, therefore, did not cease to be an excise duty even if it was levied on the exporter after declaration of excess wastage. The taxable event was still the production or manufacture.
>
> *** *** ***
>
> 18. …. If out of the quantity of military rum in a consignment, a part of portion is claimed to have been wastage in transit and to that extent did not result in export, the State would, in the absence of reasonable explanation, have reason to presume that the same have been disposed of otherwise than by export and impose on it the differential excise duty. A statute has to be construed in light of the mischief it was designed to remedy. There is no dispute that excise duty is a single point duty and may be levied at one of the points mentioned in Section 28."
>
> (underlining supplied)

39.2. In the case of ***M/s Mohan Meakin Brewery Ltd.*** (supra), the question of exigibility of beer to excise duty arose in respect of excess wastage in the brewery. With reference to the aforesaid decision in the case of ***Delhi Cloth Mills*** as also several other decisions and upon interpretation of Section 29*(e)(i)* of the Act of 1910, this Court reaffirmed that exigibility of the liquor (beer in that case) to excise duty occurred at the stage of manufacture or production in the following words:-

> "**33.** Section 29(*e*)(*i*) of the U.P. Excise Act makes it clear that in the case of beer manufactured in a brewery, excise duty may be levied, by a rate charged upon the quantity produced or issued from the brewery or issued from a warehouse. This means that in respect of beer that undergoes the process of filtration, the exigibility to excise duty will occur either at the end of the filtration process when it is received in storage/bottling tanks or when it is issued from the brewery. In regard to draught beer drawn directly from fermentation vessels, without further processing or filtration, the exigibility to excise duty will occur either at the end of the fermentation process or when it is issued from the brewery."
>
> (underlining supplied)

42. The very same provision [i.e., Section 29*(e)(i)* of the Act of 1910], which has been interpreted by this Court in the aforesaid decision of ***M/s Mohan Meakin*** in relation to beer manufactured in a brewery, applies with necessary variations to the case of spirit manufactured in a distillery established under Section 18. Undoubtedly, the liquor in question was manufactured by the respondent company in its distillery established under Section 18. Thus, the liquor that had been produced, became exigible to excise duty at the end of the distillation process when it was received in storage/bottling tanks or when it was issued from the distillery. To put it differently, the taxable event was production or manufacture of this liquor, for it being a duty upon the goods and not upon sale or proceeds of sale of the goods.

43. As per Section 19, no intoxicant (and that obviously includes the liquor manufactured by the respondent) can be removed from the distillery or the place of storage unless the duty leviable thereupon has been paid or a bond has been executed for the payment thereof. Considering the overall scheme of the Act and the Rules, it may not be out of place to

interpret the expression “removal” in Section 19 to include wastage in excess of permissible limit of total quantity of spirit produced or manufactured and stored. A comprehensive look at the scheme of Sections 17 to 19 and 28 and 29 of the Act of 1910 and the enunciations of this Court leave nothing to doubt that in respect of the liquor that had undergone the process of distillation, exigibility to excise duty had occurred at the end of

the distillation process or when it was issued from the distillery. The point of quantification of this duty, even if linked in point of time to the date of issue for sale in terms of proviso to Section 29, does not relate to the 'event of chargeability' that had occurred as soon as the liquor was distilled and received in the bottling tank or had been otherwise issued from distillery. In other words, the liquor that was lying stored in the bonded warehouse had already become subject to the excise duty, with postponement of actual charging of the duty as per the rate applicable on the date and time of issue for sale from the warehouse. It gets perforce reiterated that taxable event was production or manufacture, and not sale, of the liquor. In this view of the matter, the submission that the levy in question is not authorised by law, and is hit by Article 265 of the Constitution of India, remains untenable and is required to be rejected.

43. As regards the applicable rules for the demand in question, the High Court has proceeded on the reasoning that the present one had not been the case of wastage in handling and therefore, Rule 7(11) of the Rules of 1969 would not be applicable. The respondent company has also submitted that Rule 7(11) of the Rules of 1969 is inapplicable and it is pointed out that even the State Government had directed the Excise Commissioner to proceed under Rule 709 of the Excise Manual and not Rule 7(11) of the Rules of 1969, which deals only with wastage in normal course of bottling operation and storage. It has further been contended that only Rule 709 of the Excise Manual could be taken recourse of by the

Government, but in that case, the distillery could be made liable only if it could be shown that the loss had been caused to the Government by any negligence on part of the distillery.

45. In regard to the above submissions, though the demand in question would be essentially referable to Rule 709 of the Excise Manual, but Rule 7(11) of the Rules of 1969 provides for an allowance up to 1% on the total quantity of spirit stored during a month towards actual loss in bottling and storage; and the licencee is responsible for payment of duty on the wastage in excess of 1%. This Rule 7(11) makes it clear that even in relation to the wastage in storage, the allowance is only up to 1% of total quantity of spirit stored during a month. This provision may also be read with Rule 813 of the Excise Manual, which provides for free wastage allowance for different kinds of spirit in a distillery with the specified percentage, namely the plain and spiced spirit (0.7%), rectified and sophisticated spirit (0.4%), and denatured spirit (0.5%). The significant aspect of the matter is that though wastage allowance is provided for different kinds of spirit but, the bottled spirit is specifically excluded therein.

46. A comprehensive look at the relevant provisions of law makes it clear that so far as IMFL is concerned, no provision is made in the Excise Manual for any wastage allowance in relation to the bottled sprit, but, in terms of Rule 7(11) of the Rules of 1969, an allowance up to 1% on the total quantity of spirit stored during a month may be allowed for actual loss in bottling and storage. Any allowance for any wastage or loss beyond the

same remains, obviously, impermissible. The logic is not far to seek. As noticed, in respect of the liquor that had undergone the process of distillation, exigibility to excise duty had occurred at the end of the distillation process or when it was issued from the distillery. Thus, any loss or wastage of the bottled spirit would be directly a loss of excise duty it had already become exigible to. The rule making authority has taken abundant care to ensure that there is no pilferage of the excise revenue available to the Government on the bottled spirit by any act of wastage, while making the licencee responsible for payment of duty on wastage in excess of 1% on the total quantity of spirit stored during the month. Thus, neither the submissions on behalf of the respondent company nor the observations of the High Court about the total inapplicability of Rule 7(11) could be accepted. In other words, Rule 7(11) of the Rules of 1969 is required to be taken into account for the legal consequences that so far as the bottled spirit is concerned, the licencee remains responsible for payment of duty on any kind of wastage in excess of 1%. Coupled with this provision, Rule 709 of the Excise Manual makes it clear that the distillery remains responsible for safe custody of the stock of spirit and remains liable to make good any loss of revenue caused to the Government by their negligence.

46. Therefore, a plain answer to the legal issue raised on behalf of the respondent company is that the demand in question cannot be said to be unauthorised but, its validity would depend on answer to the question as to whether negligence could be imputed on the respondent company in terms

of Rule 709 of the Excise Manual. We shall examine various features related with this question in the next segment of discussion.

Whether respondent company remains liable to pay excise duty on the liquor lost in fire

47. As noticed, the fire incident in question led the Excise Commissioner to propose recovery of excise duty on the stock of IMFL destroyed in fire from the respondent company and the respondent company maintained that the incident was due to the reasons beyond human control and there was no negligence on its part. However, ultimately, the Excise Commissioner passed the order dated 11.07.2006 holding, *inter alia*, that the respondent company had not arranged the fire proof electric equipments of good quality due to which the incident had taken place; and the carelessness of the distillery for the safety of stock cannot be attributed to an act of God. The High Court has, however, held that the inference drawn by the Excise Commissioner was nothing but of conjectures and surmises without any material foundation. The High Court has also observed that when a fiscal liability was founded on a condition precedent, i.e., negligence on the part of the person concerned, no responsibility could be fixed unless such negligence was shown to be founded on some material. According to the appellants, the incident in question is attributable only to some negligence on the part of the respondent company and it had not been an act of God for having occurred on account of fault in the electrical installation and short circuit; and the

incident was avoidable if proper and necessary care was taken by the respondent company. On the other hand, on behalf of the respondent, though the principles relating to an “act of God” have not been invoked as such before us but the contention has been that the fire was not caused by the negligence of the respondent company in maintaining safe custody of the stock of spirits; and the incident had been the one which occurred for the reasons beyond the control of human agency. It has also been contended that the entire distillery (including the godown) has been under lock and key of the department; and the department had been exercising complete control and supervision over the distillery and, therefore, no negligence could be imputed on the respondent.

Control of Department over the distillery and godown: effect of

48. In view of rival submissions, we may begin with the issue relating to supervision and control of State Excise Department over the distillery and the godown. The submissions made in this regard on behalf of the respondent company remain baseless and have only been noted to be rejected. In the scheme of the Act of 1910, the Rules of 1969 and the Excise Manual, it is evident that the Government is not liable for destruction, loss or damage of any spirit stored in distillery by fire or theft or any other cause (as per Rule 708 of the Excise Manual). On the other hand, distillery is made responsible for safe custody of the stock of spirit and is also made liable to make good any loss of revenue caused to the Government by their negligence.

47.1. It has rightly been contended on behalf of the appellants that the purpose of posting Excise Officers in the distillery is for securing the interest of the State by collection of revenue and to put a check over any act of theft, wastage, illegal sale as also to ensure proper implementation of rules. Rule 736 of the Excise Manual makes it clear that the doors of buildings or rooms which are used for storage of spirit are under double locks, where one of the locks is of the Excise Department and other of the distillery. The other provisions of the Rules of 1969 and the Excise Manual further make it clear that as regards general arrangement and management of distilleries, elaborate provisions have been made like as to how the pipes would be laid, fixed and painted, as to how lock fastening would be constructed etc. Even a minor alteration in the distillery arrangement requires previous sanction of the Excise Commissioner (Rule 771) and repairs etc. are to be reported (Rule 772). The rules in their conspectus provide for strict supervision and control of the Excise Department over the working of distillery at every stage but that supervision and control does not correspondingly absolve the distillery of its duty and responsibility towards safe custody of the stock of spirit and towards avoidance of wastage. Any doubt in that regard is effectively quelled by a combined reading of Rules 708 and 709 of the Excise Manual as also Rule 7(11) of the Rules of 1969. The contentions in this regard as urged on behalf of the respondent company are, therefore, rejected.

Negligence

50. Now, for entering into the core of this matter, i.e., as to whether the loss of revenue caused to the Government by destruction of liquor in fire could be attributed to any negligence on the part of the respondent company, we may take note of the legal principles related with the liability arising out of, or due to, negligence as also the exceptions and defences in relation to any claim based on negligence.

51. "Negligence" is one such class of "wrongs" that leads to liability. The fundamental jurisprudential principle of "liability" is crisply defined in Salmond on Jurisprudence[9] thus: -

> "Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong."

"Liability" arises from breach of duty, which may be in the form of an act or omission. We need not delve, for the present purpose, on the classification of liability into civil or criminal and remedial or penal and various other jurisprudential features of liability. In the present case, we are primarily concerned with the question of liability arising out of negligence. Having regard to the questions involved and the provisions applicable, it would be appropriate to take into comprehension the meaning and connotation of the term "negligence" with reference to the dictionaries, lexicons and decided cases.

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10 12th Edition, p. 349.

49.1. In Concise Oxford English Dictionary[10], the term “negligence” is defined and explained as under: -

> “**negligence ▪ n**. failure to take proper care over something. ➤ Law breach of a duty of care which results in damage.”

The adjective of this expression is “negligent” and its adverb form is ‘negligently’. These expressions, for deeper understanding need to be correlated with the verb ‘neglect’ that has been defined and explained in the same dictionary as under: -

> “**neglect ▪ v.** fail to give proper care or attention to. ➤ fail to do something. ▪ **n.** the state or process of neglecting or being neglected. ➤ failure to do something.”

49.2. In Webster’s Third New International Dictionary,[11] the terms “neglect” and “negligence” are defined and explained as under: -

> “**ne•glect 1 a :** to give little or no attention or respect to **:** consider or deal with as if of little or no importance **:** DISREGARD, SLIGHT <some of the most significant issues have been *~ed* -Bruce Payne> <*~ed* the real needs of the students> **b :** to fail to attend to sufficiently or properly **:** not give proper attention or care to ….. **2 :** to carelessly omit doing (something that should be done) either altogether or almost altogether **:** leave undone or unattended to through carelessness or by intention **:** pass lightly over <*~ing* their obvious duty> <*~ed* to mention that he was a convict –Bernard Smith>.
>
> “**neg•li•gence 1 a :** the quality or state of being negligent **b :** a failure to exercise the care that a prudent person usu. exercises – opposed to *diligence;*”

12 11th Edition, p. 958.
13 1976 Edition Vol. II p. 1513

49.3. In Black's Law Dictionary[12], "negligence" and several of its forms and features have been explained. For the present purpose, we may usefully extract the relevant parts as under: -

> "**negligence,** *n.* (14c) **1.** The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregardful of others' rights; the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances…..
>
> **active negligence.** (1875) Negligence resulting from an affirmative or positive act, such as driving through a barrier. Cf. *passive negligence*.
>
> **advertent negligence.** (1909) Negligence in which the actor is aware of the unreasonable risk that he or she is creating; RECKLESSNESS. – Also termed *willful negligence; supine negligence*.
>
> **casual negligence.** (1812) A plaintiff's failure to (1) pay reasonable attention to his or her surroundings, so as to discover the danger created by the defendant's negligence, (2) exercise reasonable competence, care, diligence, and skill to avoid the danger once it is perceived, or (3) prepare as a reasonable person would to avoid future dangers.
>
> **gross negligence.** (16c) **1.** A lack of even slight diligence or care. ● The difference between *gross negligence* and *ordinary negligence* is one of degree and not of quality. Gross negligence is traditionally said to be the omission of even such diligence as habitually careless and inattentive people do actually exercise in avoiding danger to their own person or property. – Also termed *willful and wanton misconduct*. **2.** A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages. – Also termed *reckless negligence; wanton negligence; willful negligence; willful and wanton negligence; willful and wanton misconduct; hazardous negligence; magna neglegentia.*
>
> **inadvertent negligence.** (18c) Negligence in which the actor is not aware of the unreasonable risk that he or she is creating, but should have foreseen and avoided it. – Also termed *simple negligence*.

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13 10th Edition pp. 1196-1198

> **passive negligence.** (18c) Negligence resulting from a person's failure or omission in acting, such as failing to remove hazardous conditions from public property. Cf. *active negligence*."

49.4. In P. Ramanatha Aiyar's Advanced Law Lexicon[13], various connotations of the expression "negligence" are stated, *inter alia*, in the following terms: -

> "**Negligence.** Failure to use the care that a reasonable and prudent person would have used under the same or similar circumstances.
>
> Negligence in law signifies a coming short of the performance of duty.
>
> Failure to use the care that a reasonably prudent and careful person would use under similar circumstances.
>
> Negligence is "the absence of proper care, caution and diligence; of such care, caution and diligence, as under the circumstances reasonable and ordinary prudence would require to be exercised."

51. Salmond on Jurisprudence[14] refers to a terse exposition in ***Grill v. General Iron Screw Colliery Co.*: (1866) L.R. 1 C.P.**, that negligence is "*the absence of such care as it was the duty of the defendant to use*"; and further explains the subtle distinction of inadvertent and advertent negligence in the following: -

> "It is to be observed, in the second place, that carelessness or negligence does not necessarily consists in thoughtfulness or inadvertence. This is doubtless the commonest form of it, but it is not the only form. If I do harm, not because I intended it, but because I was thoughtless and did not advert to the dangerous nature of my act, or foolishly believed that there was no danger, I am certainly guilty of negligence. But there is another form of negligence, in which there is no thoughtlessness or inadvertence whatever. If I drive furiously down a crowded street, I may be fully conscious of the serious risk to which I expose other persons. I may not intend to injure any of them, but I knowingly and intentionally

15 5th Edition, Vol. 3, p. 3435
16 *Ibid* p. 380

> expose them to the danger. Yet if a fatal accident happens, I am liable, at the most, not for wilful, but for negligent homicide. When I consciously expose another to the risk of wrongful harm, but without any wish to harm him, and harm actually ensues, it is inflicted not wilfully, since it was not desired, nor inadvertently, since it was foreseen as possible or even probable, but nevertheless negligently (*c)*.
>
> Negligence then is failure to use sufficient care, and this failure may result from a variety of factors….."

52. Without multiplying the case law on the topic, sufficient it would be to refer to the connotation of the term "negligence" explained succinctly by this Court in the case of ***State of Maharashtra and Ors.*** **v.** ***Kanchanmala Vijaysing Shirke and Ors.*****: (1995) 5 SCC 659** as follows: -

> "9.…'Negligence' is the omission to do something which a reasonable man is expected to do or a prudent man is expected to do..."

53. Therefore, it could be reasonably summarised for the present purpose that failure to exercise that care which a reasonably prudent person would usually exercise under similar circumstances would amount to negligence; it is not necessary that negligence would always be advertent one where the wrongdoer is aware of unreasonable risk being created but it may be inadvertent or passive too, arising for want of foresight or because of some omission. However, the question as to whether the liability because of negligence could be fastened on the respondent company or not cannot be determined without dealing with the other aspects related with exceptions and defence to the allegation of negligence.

Act of God

54. In its assertions before the Department as also before the High Court, the respondent company attempted to rely upon the principles related with “act of God” and it was sought to be suggested that if the fire had taken place despite the company having taken all care, it was nothing but an act of God of which, no human agency had any control. The High Court has accepted this part of submissions. Though in the argument before us, learned counsel for the respondent has not laid much stress on this theory but looking to the relevant background, it would be apposite to take note of a few features related with “act of God” and its connotations on the jurisprudential principles of liability.

55. In P. Ramanatha Aiyar’s Advanced Law Lexicon[15], variegated connotations of the term “act of God” or *Vis major* are specified with reference to the treatise and citations. A few relevant aspects for the present purpose could be usefully extracted as under: -

> “All natural agencies, as opposed to human activities, constitute acts of God, and not merely those which attain an extraordinary degree of violence or are of very unusual occurrence. The distinction is one of kind and not one of degree. The violence or rarity of the event is relevant only in considering whether it could or could not have been prevented by reasonable care : if it could not, then it is an act of God which will relieve from liability, howsoever trivial or common its cause may have been. If this be correct, then the unpredictable nature of the occurrence will go only to show that the act of God in question was one which the defendant was under no duty to foresee or provide against. It is only in such a case that the act of God will provide a defence.” R.F.V. HEUSTON. *Salmond on the Law of Torts* 330 (17th ed. 1977).
>
> “A natural act such as a storm, floods or an earthquake which cannot be foreseen and usually absolves a person from liability if damage occurs as a result.

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16 5th Edition, p. 83

> Any event so out of the ordinary that it could not have been prevented by any amount of human care and forethought, *e.g.* lightning, freak tidal waves or floods *etc.,* which relieves a contractor, such as a freight carrier, of any liability for losses suffered as a result of it."
>
> "…..The expression 'act of God' signifies the operation of natural force free from human intervention, such as lightning. It may be thought to include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones and tidal-bures and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse, unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing at….."

54.1. The case of ***Mahadeva Shetty*** (supra) related to the loss suffered by the claimant due to the injuries sustained in a vehicular accident that rendered him paraplegic. The bus in which he was a passenger plunged into a pit after rolling down from a great height. The stand of the appellant Corporation in opposition to his claim petition was that the accident was not due to rash and negligent driving but was an act of God. In that context, this Court explained the essential features concerning an act of God in contradistinction to an act or omission of human beings in the following words: -

> "9. The expression "act of God" signifies the operation of natural forces free from human intervention, such as lightening, storm etc. It may include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones, tidal waves and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing. For instance, where by experience of a number of years, preventive action can be taken, Lord Westbury defined the act of God (*damnum fatale* in Scotch Laws) as an occurrence which no human foresight can

> provide against and of which human prudence is not bound to recognize the possibility. This appears to be the nearest approach to the true meaning of act of God. Lord Blancaburgh spoke of it as "an irresistible and unsearchable providence nullifying our human effort".

54.2. In the case of ***Vohra Sadikbhai Rajabhai*** (supra), the water released from a dam constructed by the respondents flooded the land of the appellants and destroyed the plantation therein. As per the respondents, the water had to be released from the dam as it reached alarming level because of heavy rains and non-release would have breached the dam; and that the action was taken in public interest and it was occasioned because of the rains, which was an act of God. The appellants, on the other hand, contended that it was sheer negligence on the part of the respondents in not maintaining low level of the water keeping in mind the ensuing monsoon season and, therefore, the damage which the appellants suffered had direct nexus or causal connection with the aforesaid act of negligence and it could not be attributed to the rains; and hence, the respondents could not term it as an act of God and excuse themselves from tortious liability. The Trial Court and the High Court accepted the case of respondents that they were forced to release the water due to the heavy rains; and that the land of the appellants was situated adjacent to the river bank and, therefore, due to heavy rain, the river could have overflown resulting in entering of the water into the fields of the appellants in any case.

54.2.1. In appeal, this Court, while examining the question as to whether it were a case of gross negligence, observed that the respondents did not properly controvert the allegations of the appellants that water was not maintained at an appropriate level to take care of ensuing monsoons. They had also not supported their plea to the effect that had the water been not released, it would have breached the dam and that act would have caused more public harm. This Court held that since the dam was constructed and maintained by the respondents and the appellants suffered losses as a result of release of water from the said dam, onus was on the respondents to prove that they had taken proper care in maintaining appropriate level of water in the dam. This Court further held that the respondents were the owners of the dam in question; and they were expected to keep the dam in such a condition which avoided any loss or damage of any nature to the neighbours or passersby. This Court observed that merely by saying that the level of water in the dam increased because of monsoon rains and that the water was released in public interest could not be treated as discharging the burden on the part of the respondents in warding off the allegation of negligence. While rejecting the defence of an “act of God”, this Court explained thus: -

> “22. …. An act of God is that which is a direct, violent, sudden and irresistible act of nature as could not, by any amount of ability, have been foreseen, or if foreseen, could not by any amount of human care and skill have been resisted. Generally, those acts which are occasioned by the elementary forces of nature, unconnected with the agency of man or other cause will come under the category of acts of God. Examples are: storm, tempest, lightning, extraordinary fall of rain, extraordinary high tide, extraordinary severe frost, or a

> tidal bore which sweeps a ship in mid-water. What is important here is that it is not necessary that it should be unique or that it should happen for the first time. It is enough that it is extraordinary and such as could not reasonably be anticipated……"

54.3. The case of ***Patel Roadways*** (supra) essentially related to a common carrier's liability when goods entrusted to it were destroyed in a fire that took place in the godown of the appellant. As regards the question of negligence vis-a-vis a common carrier's liability, this Court referred to a passage from *Sarkar on Evidence* (15th Edn., 1999) at p. 1724 and observed that as a rule, negligence is not to be presumed; it is rather to be presumed that ordinary care has been used but that this rule does not apply in the case of common carriers, who, on grounds of public policy, are presumed to have been negligent if goods entrusted to their care have been lost or damaged or delayed in delivery.

56. The present one had not been a case where anything related with the forces of nature like storm, floods, lightning or earthquake had been in operation or caused the fire. When nothing of any external natural force had been in operation in violent or sudden manner, the event of the fire in question could be referable to anything but to an act of God in legal parlance. The observations of High Court in this regard do not appear sound and are required to be disapproved.

57. The submissions before this Court on behalf of the respondent company had been that the company had taken all precautions which was expected of it and yet if the fire incident took place, it was something

beyond human control for which respondent company cannot be held liable. This line of submission, at best, could be taken into another exception to the rules governing liability, where inevitable accident is generally recognised as a ground of exception. Again, we may refer to the principles stated by Salmond[16] thus: -

> "Accident, like mistake, is either culpable or inevitable. It is culpable when due to negligence, but inevitable when the avoidance of it would have required a degree of care exceeding the standard demanded by the law. Culpable accident is no defence, save in those exceptional cases in which wrongful intent is the exclusive and necessary ground of liability. Inevitable accident is commonly a good defence, both in the civil and in the criminal law.
>
> To this rule, however, there are, at least, in the civil law, important exceptions. These are cases in which the law insists that a man shall act at his peril, and shall take his chance of accidents happening. If he desires to keep wild beasts (*f*), or to construct a reservoir of water (*g)*, or to accumulate upon his land any substance which will do damage to his neighbours if it escapes (*h)*, he will do all these things *suo periculo* (though none of them are *per se* wrongful), and will answer for all ensuing damage, notwithstanding consummate care….."

58. To accept the case of respondent company about it being an "inevitable accident", it is to be seen if preventing of the fire in question would have required a degree of care from the respondent company beyond or exceeding the standard demanded by law. The question would thus be as to what had been the normal and reasonable requirement for safe custody of the liquor in question and if the respondent company, despite having attended on all such normal and reasonable requirements, could not have prevented the fire in question. While looking for an

17 *Ibid* p. 399

appropriate answer to this question, we shall have to take an overall view of the material available on record as also all the surrounding factors and circumstances. In this regard, before proceeding further, we could profitably refer to a significant guiding principle embodied in the maxim *res ipsa loquitur* whereby negligence may be presumed from the mere fact of accident; of course, the presumption depends upon the nature of the accident and the surrounding factors.

Res ipsa loquitur

59. In order to understand the operation of the maxim *res ipsa loquitur*, we may usefully refer to a couple of the decisions of this Court. Of course, these decisions related with vehicular accidents but the principles therein remain fundamental in operation of *res ipsa loquitur*.

58.2. ***Shyam Sunder and Ors.*** **v.** ***The State of Rajasthan*****: (1974) 1 SCC 690** had been a case where the victim was travelling in a truck whose engine got fire and while jumping from the vehicle, he struck against a stone on the side of the road and died on the spot. The High Court in that case held that merely for the truck catching the fire would not be evidence of negligence on part of the driver; and that *res ipsa loquitur* had no application. However, this Court, *inter alia*, pointed out and held as under:-

> "9…. The **maxim res ipsa loquitur** is resorted to when an accident is shown to have occurred and the cause of the accident is primarily within the knowledge of the defendant. The mere fact that the cause of the accident is unknown does not prevent the plaintiff from recovering the damages, if the proper inference to be drawn from the circumstances which are known is that it was caused by the negli-gence of the defendant. The fact of the accident may, sometimes,

constitute evidence of negligence and then the maxim **res ipsa loquitur** applies."

58.1.1. This Court then quoted the following passage from the case of ***Scott v. London & St. Katherine Docks*: (1865) 3 H&C 596, 601: -**

> "... where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordi-nary course of things does not happen if those who have the man-agement use proper care, it affords reasonable evidence, in the ab-sence of explanation by the defendants, that the accident arose from want of care."

58.1.2. This Court further explained the operation of this maxim for importing strict liability into negligence cases and observed: -

> "The mere happening of the accident may be more consistent with the negligence on the part of the defendant than with other causes. The maxim is based on commonsense and its purpose is to do justice when the facts bearing on causation and on the care exercised by defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant (see **Barkway v. S. Wales Transo** [(1950) 1 All ER 392, 399])."

58.2. In ***Pushpabai Purshottam Udeshi and Ors. v. M/s. Ranjit Ginning & Pressing Co. (P) Ltd. and Anr.* (1977) 2 SCC 745**, this Court again explained the application of the principle of *res ipsa loquitur* and explained various features thereof in the following words: -

> **"**6**.** The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some

> other cause than his own negligence. Salmond on the Law of Torts (15th Ed.) at p. 306 states: “The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused”. In Halsbury's Laws of England, 3rd Ed., Vol. 28, at p. 77, the position is stated thus: “An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence ‘tells it own story’ of negligence on the part of the defendant, the story so told being clear and unambiguous”. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part…..”

The respondent company remains liable

60. For what has been discussed hereinabove, this much is apparent that in this case, the warehouse in question indeed got engulfed in fire and that led to destruction of the liquor stored therein. Here, the respondent company could be held liable to pay the excise duty on the liquor destroyed in fire only if it could be held negligent in not ensuring safe custody of the stored liquor. As regards this aspect, the fact that Department had control and supervision over the distillery and godown would not absolve the respondent of its liability. Further, the fire incident in question cannot be termed as an “act of God”.

61. The matter then boils down to the question if the fire incident could be said to be an inevitable accident. For that matter, we need to examine as what had been the normal and reasonable requirement for safe custody

of the liquor in question and as to what could be deduced from the surrounding factors.

60.1. One of the basic factors to be noticed is that the goods in question were not ordinary goods but had been containing alcohol which, by its very nature, is highly inflammable. Therefore, a particular nature of care which might be sufficient as regards ordinary goods may not be adequate or sufficient for the goods in question.

60.2. On 19.09.2002, the Assistant Electricity Inspector who conducted periodical inspection of the premises in question made two observations. One of them was a minor aspect that 'Caution' plate was not placed at certain prominent place but the other observation was a significant one that at one point of distribution panel, earth wiring was found with thin wire; and it was suggested that same should be removed and strip earthing should be done.[17] On 01.03.2003, while issuing No Objection Certificate, the Fire Brigade Officer, *inter alia,* observed that firefighting equipments were at right place and were in working condition but in future, they should be tested in fire station Shahjahanpur before refilling; and it was also suggested that Foam Installation should be provided for better management of firefighting arrangements.[18]

60.2.1. From the material placed on record, it is not forthcoming if strip earthing had indeed been carried out, though the respondent company generally stated in its letter dated 23.09.2002 that what was pointed out by

19 *vide* paragraph 7.1 supra
20 *vide* paragraph 7.3 supra.

the Assistant Electricity Inspector had been carried out. As to when strip earthing was done and in what manner is not forthcoming. Further, it is also not forthcoming if Foam Installations were provided, as suggested by the Fire Brigade Officer. In view of extra care required of the highly inflammable material, significance of none of these aspects could be gainsaid.

60.3. Though it is true that as per the suggestions made in the reports relating to the fire incident in question, exact cause of fire could not be ascertained but there had been indications that the officers, including the Excise Officer and Station House Officer had seen burnt wires; and it was reported that the fire 'possibly' took place because of short circuit. Taking note of these facts as also the other facts that godown was an old one and the roof of the godown was made of asbestos sheets, the Excise Commissioner, in his order dated 11.07.2006, inferred that short circuit could have taken place in old electric wiring in the godown and in that context, observed that the licencee had not arranged the fire proof electric equipments of good quality, which led to the incident in question.

62. A few words as regards 'short circuit' would also be apposite at this juncture.

61.1. Short circuit is explained in the Dictionary of Technical Terms[19] by F.S. Crispin as follows :-

> "Short circuit (*elec.):* A path of low resistance placed across an electrical circuit causing an abnormal flow of current."

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20 11th Edition, p. 369.

61.2. In McGrow-Hill Encyclopedia of Science and Technology[20], the relevant features of short circuit are stated as under: -

> "An abnormal condition (including an arc) of relatively low impedance, whether made accidentally or intentionally, between two points of different potential in an electric network or system. *SEE CIRCUIT (ELECTRICITY); ELECTRICAL IMPEDANCE.*
>
> Common usage of the term implies an undesirable condition arising from failure of electrical insulation, from natural causes (lightning, wind, and so forth), or from human causes (accidents, intrusion, and so forth). From an analytical viewpoint, however, short circuit represent a severe condition that the circuit designer must consider in designing an electric system that must withstand all possible operating conditions. The short circuit thus is important in dictating circuit design parameters (wire size and so on) as well as protective systems that are intended to isolate the shorted element. *SEE ELECTRIC PROTECTIVE DEVICES; ELECTRICAL INSULATION; LIGHTNING AND SURGE PROTECTION."*

61.3. In the present case, even when the exact cause of fire could not be ascertained, the indications in the reports like that of Assistant Excise Commissioner dated 02.08.2003[21] that burnt cables were seen in the debris and possibility had been of short circuit, the only inference could be about some fault or shortcoming in electric installations (equipments and/or wiring) which led to the abnormal flow of current and thereby, to the fire incident in question.

63. As noticed, the fire incident in question had not taken place due to operation of any forces of nature. It has also not been the case that the fire was a result of any mischief by any person. Noticeably, the fire that started around 12:55 p.m. on 10.04.2003 could be brought under control by the

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21 6th Edition, volume 16, p 387.

[21] *vide* paragraph 11 supra.

firefighters only by 5:00 a.m. on 11.04.2003. When all the relevant factors are cumulatively taken into account, we find it difficult to accept that the fire and the resultant loss had been beyond the control of human agency so as to be termed as inevitable accident. Obviously, the fire had not generated on its own and, with appropriately laid fire proof electrical installations as also firefighting measures, the incident was an avoidable one or at least the loss could have been minimised.

64. As noticed, the fault of “negligence” need not always be of active negligence or of gross negligence, but it may also be of an inadvertent negligence or of a passive negligence. It does not require much of discussion to say that the goods in question, being highly inflammable, required extra and excessive care for their safe custody; and any laxity or slackness in that regard was impermissible. To put it differently, what was required for ensuring safe custody of the goods in question was that of heightened safeguard measures with foresight. When the respondent had not been able to protect the goods in question from fire within the warehouse and when all other factors, as noticed above, are taken into account, the negligence as contemplated in Rule 709 of the Excise Manual is directly attributable to the respondent company. In other words, even if the present case is taken to be that of inadvertence or of unintentional omission on the part of the respondent company, it would fall within the

definition of “negligence” for the purpose of Rule 709 of the Excise Manual.

63.1 In the given set of facts and circumstances, we are unable to endorse the approach and views of the High Court, where it had basically proceeded on the premise as if the incident in question was referable to an 'act of God'. As noticed, the incident in question had not been because of any forces of nature and cannot be said to be an 'act of God'. The criticism of Excise Commissioner's order dated 11.07.2006 by the High Court, while taking the observations and findings therein being of surmises and conjectures, is also required to be disapproved. What the Excise Commissioner had observed in the order dated 11.07.2006 had been of his inferences, which were deduced out of the facts and circumstances of the case and in true application of the principles of *res ipsa loquitur*.

65. Hence, we have no hesitation in disapproving the order of the High Court and in endorsing the views of the Excise Commissioner in the order dated 11.07.2006.

Insurance coverage only of the value of liquor: effect of

67. Before concluding on the matter, it would also be appropriate to deal with yet another feature of this case relating to the insurance coverage taken by the respondent company only of value of liquor and not that of excise duty payable thereupon.

68. Admittedly, the respondent company had taken insurance coverage of the value of liquor and indeed received such value of liquor from the insurer. However, respondent company did not take insurance coverage of the excise duty payable over such value of liquor. The appellants contend

that when the distiller has received value of liquor, on the principles of equity and fair play, the corresponding excise duty ought to be made available to them. It has also been contended that omission on the part of the respondent company to take insurance coverage of value of excise duty, while taking coverage of the value of liquor, itself amounts to negligence. On the other hand, the respondent would submit that the claim received from the insurer cannot be termed as consideration because there was no transfer of property in goods and there was no sale. It has also been submitted that there was no such requirement in law that the respondent company was to take insurance coverage of the excise duty too. Yet further, it has also been submitted that clearance of insurance claim by the insurer itself shows that there was no negligence on the part of the respondent. The Excise Commissioner in its order dated 11.07.2006 has observed that the distiller had taken insurance of the value of goods and for this reason too, it remained rather lax in taking all care against fire.

68. Having examined the matter in its totality, we are clearly of the view that the liability of the respondent company in this matter is rather fortified from the facts that it had taken insurance coverage of the value of liquor and indeed received such claim from the insurer. Further, failure to insure the risk of excise duty liability cannot extricate the respondent from that liability.

69. As noticed, in the scheme of law applicable, when duty of excise is upon the goods and the taxable event is the production or manufacture of

the liquor, the liability to pay excise duty had arisen as soon as the liquor was manufactured. Thereafter, when the liquor got destroyed in fire but its value was recovered from the insurer, in our view, these events shall answer to the broad expression “issue of an excisable article for sale from a warehouse” for the purpose of proviso to Section 29(*e*) of the Act of 1910. Putting it differently, receiving of insurance claim over the value of goods by the respondent related back to the date of fire and the respondent became liable to pay excise duty at the rate which was in force on the date of fire, which would be deemed to be the date of “issue” from the warehouse.

68.1. In the given set of facts and circumstances, we are not dilating on the decision of CESTAT in the case of ***Dharampal Satyapal*** (supra) wherein remission of duty on account of damage of *pan masala* in rain water was disallowed, when it was found that the assessee had been compensated by the insurance company with an amount which was much more than the duty involved but, the submissions in the present case that the goods had not been sold and duty has not been recovered from consumers, do not take the case of respondent company any further. It was for the respondent company to take necessary measures and care to ensure that payable excise duty would reach the appellants once the goods had been manufactured.

70. Another facet of this part of matter remains, and we agree with the appellants, that not taking of insurance coverage of the excise duty while

taking such coverage on the value of liquor itself amounts to negligence on the part of the respondent company. As noticed, “negligence” has different connotations and any particular act or omission, which may not be negligence in a particular set of facts may still amount to negligence in another set of facts. In the facts of the present case, where excise duty became payable on manufacture of liquor, it was obviously expected of the respondent company, as a reasonable and prudent distiller, to take all necessary steps to safeguard not only the liquor and value thereof but also the corresponding interest of the Government, i.e., the excise revenue. The Excise Commissioner had been rather justified in drawing inference that the respondent company, after having secured the value of goods for its purpose, might not have been conscious and alert in taking all the necessary care to guard against any loss to the Government due to any mishap like fire.

71. The submission, that insurer would not have made payment of insurance claim if there was any negligence on the part of the respondent company, has its own shortcomings. The terms of fire insurance policy have not been placed on record and it cannot be deduced as to what were the terms and conditions of that policy under which insurer had acted in accepting the claim of the respondent company. Secondly, what was not treated as negligence by the insurer for the purpose of insurance claim would not *ipso facto* become a proposition binding on the appellants as

regards loss of revenue because of loss of liquor in fire. Such a contention of the respondent could only be rejected.

Summation

72. In summation of what has been discussed hereinabove, we hold, -

(i). The demand raised by the appellants against the respondent company, of excise duty on the liquor lost in fire, is authorised by law and has rightly been raised as per the applicable provisions of the Act of 1910, the Excise Manual and the Rules of 1969.

(ii). The fire incident in question cannot be said to be that of an event beyond human control and the High Court has been in error in holding that no negligence could be imputed on the respondent company.

(iii). The fact that the respondent company had taken insurance coverage only of the value of liquor (and not that of excise duty thereupon) and then, had received the insurance claim towards the value of liquor also operates against the respondent company and fortifies the conclusion about negligence of the respondent company.

71.1. Upshot of the discussion foregoing is that this appeal deserves to succeed and the writ petition filed by the respondent company deserves to be dismissed. As a necessary corollary, the miscellaneous application filed by the respondent company, for consideration of its refund application, is rendered redundant and deserves to be dismissed as such.

Conclusion

73. Accordingly, and in view of the above, this appeal is allowed; the impugned orders dated 10.04.2017 in Misc. Bench No. 4493 of 2006 and dated 06.11.2019 in C.M. Application No. 90936 of 2019 are set aside; and the writ petition as also the miscellaneous application filed by the respondent company are dismissed but with no order as to costs.

……J.
(A.M. KHANWILKAR)

……J.
(DINESH MAHESHWARI)

……J.
(KRISHNA MURARI)

New Delhi;
January 05, 2022