
(1983) 09 MP CK 0020

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1303 of 1982

Lilasons Breweries (P.) Ltd. Bhopal

APPELLANT

Vs

State of M. P. and others

RESPONDENT

Date of Decision : 16-09-1983

Acts Referred:

Madhya Pradesh Excise Act, 1915 — Section 13

Citation : (1984) JLJ 278 : (1983) MPLJ 860

Hon'ble Judges : G.P. Singh, C.J.; Faizanuddin, J

Bench : Division Bench

Advocate : Y.S. Dharmadliikari, for the Appellant; R.K. Verma, Deputy Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

G.P. Singh, C.J.

The petitioner Lilasons Breweries (Private) Ltd. is a Private Limited Company. The petitioner has established a brewery in the industrial area of Govindpura, Bhopal. The petitioner has been granted a licence for running the brewery in Form B-I-A. The petitioner also holds licences for bottling beer and for selling beer in Forms F-L-8 and F-O-II. The beer manufactured by the petitioner is known as Khajuraho Brand. The duty payable on export of this beer outside Madhya Pradesh till 18th March 1981 was 10 Paise per quart but from 19th March 1981 the duty has been raised to Re. 1 /- per quart. The District Excise Officer acting as Additional Tahsildar, Bhopal, issued a demand notice to the petitioner dated 4th September 1982 for recovery of Rs. 2,12,621 which is the enhanced duty for the period from 19th March 1981 to 31st March 1981. By this petition under Article 226 of the Constitution the petitioner challenges the enhancement of duty from 10 Paise per quart to Re. 1 /- per quart with effect from 19th March 1981 and the demand of the enhanced duty.

The import, export, transport, manufacture, possession and sale of intoxicating

liquor and intoxicating drugs are regulated in Madhya Pradesh by the M. P. Excise Act, 1915. No distillery or brewery can be established or worked except under the authority and subject to the terms and conditions of a licence granted in that behalf. This is specifically provided in section 13 of the Act. Section 25 deals with the levy of excise duty. It reads as follows:-

Duty on excisable articles.

(1) An excise duty or a counter-vailing duty, as the case may be shall, if the State Government so direct, be levied on all excisable articles-

(a) imported; or

(b) exported; or

(c) transported; or

(d) manufactured, cultivated or collected under any licence granted u/s 13; or

(e) manufactured in any distillery established, or any distillery or brewery licenced, under this Act;

Provided that it shall be lawful for the State Government to exempt any excisable article from any duty to which the same may be liable under this Act.

(2) Duty may be imposed under sub-section (1) at different rates according to the places to which any excisable article is to be removed or according to the strength and quality of such article.

(3) Notwithstanding anything contained in sub-section (1).

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

The State Government in exercise of its rulemaking power u/s 62 of the Act has made the M. P. Brewery Rules, 1970, and the Foreign Liquor Rules. Rule 41 of the Brewery Rules provides that the brewer shall be liable to pay export duty on the quantity of the beer exported outside the State at the rate determined by Government from time to time. The rate of duty is prescribed by Rule XXII (e) of the Foreign Liquor Rules which provides that "the exporter shall attach to his application a treasury challan indicating that he has paid into Government treasury situated in the district of the export duty at the rate of 11 paise per proof litre on the quantity of Indian made foreign liquor other than beer, and at the rate of Re. 1 per quart of beer he intends to export." We have already mentioned that the rate of Re. 1/- per quart on export of beer was prescribed by notification dated 18th March 1981 which came into force from the date of its publication in the Gazettee i. e. 19th March 1981. Before that the rate of duty on the export of beer was 10 paise per quart.

The first contention of the learned counsel for the petitioner is that the charge of

export duty under Rule XXII (e) is in the nature of export duty covered by Entry 83 of List 1 of the Constitution and section 25 of the M. P. Excise Act cannot authorise the State Government to levy such a duty. There can be no dispute that the State is not entitled to charge duties of customs including export duties which come within Entry 83 of List I. The case of the State is that it is only charging duty of excise under Entry 51 of List II on alcoholic liquors manufactured within the state. Now it is not in dispute that the petitioner manufactures beer within the State in the brewery established by it under the licence granted by the State in accordance with the Brewery Rules. The duty payable by the petitioner under Rule XXII (e) of the Foreign Liquor Rules, which is called the export duty, is really a duty of excise which is levied at the point of export of beer from Madhya Pradesh to another State within India. Section 25 of the Excise Act on a proper construction is a provision relating to the imposition of excise duty on excisable articles manufactured or produced within the State or countervailing duty on excisable articles manufactured or produced outside the State but imported into the State. The words "import" and "export" used in section 25 do not mean import from overseas India or export outside India. The word "import" has reference to the bringing of excisable articles in Madhya Pradesh and similarly the word "export" has reference to articles which are taken outside Madhya Pradesh. Sub-sections (1) (b) and (1) (e) of section 25 have to be read together. When an excisable article manufactured within the State is subjected to duty at the point of its export outside Madhya Pradesh, the real nature of duty is not export duty but only excise duty, i. e. a duty on goods manufactured or produced within the State. The nature of excise duty has been considered by the Supreme Court in a number of cases. In *R.C. Jall Vs. Union of India (UOI)*, , the Supreme Court observed; "Excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on the ultimate consumer, that is, its ultimate incidence will always be on the consumer. Therefore, subject always to the legislative competence of the taxing authority, the said tax can be levied at a convenient stage so long as the character of the impost, that is, it is a duty on the manufacture or production, is not lost." In *Shinde Brothers v. Deputy Commissioner, Raichur* A I R 1967 1 S C 1512, the Supreme Court reiterated the characteristics of excise duty. It was pointed out that duty of excise is clearly related to production or manufacture of goods but it does not matter if the levy is made not at the moment of production or manufacture but at a later stage and that if a duty has been collected from a retailer it would not necessarily cease to be an excise duty. (See also *Shree Synthetics Limited Vs. Union of India (UOI) and Others*, . The so called export duty levied under Rule XXII (e) of the Foreign Liquor Rules is really a duty of excise. The duty is levied on the liquor manufactured within the State but it is realised at the point of export of the liquor outside the State. It is clearly not an export duty leviable under Entry 83 of List I. The export duties referred to in this Entry are levied on the goods exported outside India. The nature of export duty under this Entry is entirely different from excise duty.

It was next contended by the learned counsel for the petitioner that Rule XXII (e) of the Foreign Liquor Rules is in conflict with Rule 41 of the Brewery Rules. We are unable to find any conflict. As already seen, Rule 41 of the Brewery Rules so far as relevant says that the brewer shall be liable to pay export duty on the quantity of the beer exported outside the State at the rate determined by Government from time to time. The rate of duty is determined by Rule XXII (e) of the Foreign Liquor Rules which on beer was 10 paise per quart before 19th March 1981 and which from 19th March 1981 was increased to Re. 1 per quart.

It was lastly contended by the learned counsel that the enhancement of duty offends Article 301 of the Constitution. The learned counsel points out that enhancement of duty by a rule made in March 1981 cannot be an existing law within Article 305 of the Constitution. It is also pointed out that Article 304 (b) is inapplicable to the enhancement because no bill or amendment was introduced in the Legislature with the previous sanction of the President or which subsequently received the assent of the President. The learned counsel has relied upon the case of *Kalyani Stores Vs. The State of Orissa and Others*, .

The notification dated 18th March 1981 enhancing the duty by amending Rule XXII (e) of the Foreign Liquor Rules is not an existing law within the meaning of Article 305 and is also not covered by Article 304 (b). To this extent the argument of the learned counsel for the petitioner has to be accepted but from this it does not necessarily follow that enhancement of duty offends Article 301 which says that trade, commerce or intercourse throughout the territory of India shall be free. Freedom of trade, commerce and intercourse protected by Article 301 must cover those trades only which a citizen has a right to carry on. If the citizen has no right to carry on a particular trade, there is no question of protection of the freedom in that trade. For example, gambling is not an activity which comes within the expression "trade and commerce" as used in Article 301. It was so held by the Supreme Court in *State of Bombay v. R. M. D. Chamarbaugwala* A I R 1957 S C 609. In that case the question related to prize competitions. It was held that the prize competitions being of a gambling nature cannot be regarded as trade or commerce. Similarly, in *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, it was held that the practice based on age-old feudal pattern of money-lending which is pernicious species of money-lending cannot be regarded as trade under Article 301. Now the question is whether dealing in liquor is trade or commerce within the meaning of Article 301. In *Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others*, it was held by the Supreme Court that dealing in liquor is business and a citizen has a right to do business in that commodity but the State can make a law imposing reasonable restrictions on the said right in public interest. It was also held that the decision of the Supreme Court in *R. M. D. Chamarbaugwala*'s case which was delivered by Das C. J. was not applicable to dealing in liquor. But *Krishna Kumar*'s case was overruled by the Supreme Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, . Chandrachud J. (as he then was) for the Court at page 1132 of the report held that the reasons

given by Das C. J. for holding that there can be no right to do trade or business in an activity like gambling apply with equal force to the alleged right to trade in liquor. He further observed : "There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers has the right to prohibit absolutely every form of activity in relation to intoxicants-its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the state and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants." It will thus be seen that the nature of alleged right to trade in liquor or any intoxicant is similar to that of a person's right to indulge in gambling and just as gambling is not trade or commerce protected by Article 301, so is dealing in liquor or intoxicants. The argument based on Article 301 of the Constitution must, therefore, fail. The right to manufacture or to otherwise deal in liquor is solely vested in the State. The State has parted with the privilege to manufacture beer in favour of the petitioner in accordance with the Brewery Rules and the Foreign Liquor Rules. The petitioner is bound by these rules. The petitioner is bound to pay the excise duty on liquor exported outside the State as may be levied from time to time by the Government. The view we have taken is supported by a ruling of the Andhra Pradesh High Court in *Mcpowell & Co. v. Board of Revenue*, A. P. 1979 Tax L R 2461 which the learned counsel for the petitioner himself with his usual fairness brought to our notice.

In the case of *Kalyani Stores* a notification issued by the State of Orissa in 1961 u/s 27 of the Bihar and Orissa Excise Act, 1915 enhancing the countervailing duty on foreign liquor imported into the State, not being existing law or saved by Articles 302, 303 and 304, was held invalid as infringing the guarantee under Article 301. It seems to have been assumed in that case that dealing in liquor is trade or commerce within Article 301. The law was then not settled that no person has a right to trade in liquor just as no one has a right to indulge in gambling. The case of *Kalyani Stores* on this point cannot hold the field after the decision of the Supreme Court in *Har Shankar's* case which has been followed in later decisions *Lakhanlal and Others Vs. The State of Orissa and Others*, , P.N. Kaushal and Others Vs. Union of India (UOI) and Others, and *State of Uttar Pradesh and Others Vs. Synthetics and Chemicals Ltd. and Others*, . It may also be mentioned that in *Nashirwar and Others Vs. State of Madhya Pradesh and Others*, which was a case under the M. P. Excise Act the view taken was the same as in *Har Shankar's* case.

The petition fails and is dismissed but without any order as to costs. Security amount be refunded to the petitioner.