

(2001) 06 BOM CK 0034

In the Bombay High Court

Case No : Writ Petition No. 2587 of 1987

Meher Distilleries Pvt. Ltd. and Another

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 18-06-2001

Acts Referred:

Bombay Prohibition Act, 1949 — Section 105
Constitution of India, 1950 — Article 14

Citation : (2002) 2 ALLMR 440 : (2002) 1 BOMLR 372 : (2002) 3 MhLj 36

Hon'ble Judges : H.L. Gokhale, J;D.B. Bhosale, J

Bench : Division Bench

Advocate : J.J. Bhat, P.A. Savant and Arun Siwadh, i.b., Gagrath and Co, for the Appellant; C.J. Sawant and R.M. Sawant, A.G.P. for Respondent No. 1, A.K. Abhyankar and A.C. Shah, for the Respondent

Final Decision : Dismissed

Judgement

H.L. Gokhale, J.—The 1st petitioner herein is a company engaged in the manufacture of country liquor. The 2nd petitioner is its Managing Director. The 1st petitioner company at the relevant time was engaged in the manufacture of country liquor from flowers which are known as Mhowra flowers. The petition seeks to challenge the notification issued by the 1st respondent State of Maharashtra u/s 105 of the Bombay Prohibition Act, 1949 on 17th July 1987 whereby the excise duty on the country liquor manufactured from Mhowra flowers amongst others came to be revised from Rs. 13/- per proof litre to Rs. 26/- per proof litre. The 2nd respondent to the petition is a Trade Union which has intervened in this matter and got added itself as a party respondent. The 2nd respondent Union is supporting the cause of the petitioners. The challenge to this notification is on the basis of Articles 14 and 19(1)(g) of the Constitution.

2. The 2nd respondent State of Maharashtra has opposed the prayers by filing affidavits from time to time. The petitioners have also filed a rejoinder thereafter. The 2nd respondent Union, which is supporting the cause of the petitioners, is

relying upon the affidavit filed at the time when a chamber summons was moved to join in the proceedings as a respondent.

3. Mr. J.J. Bhat with Mr. P.A. Sawant has appeared for the petitioners, Mr. C.J. Sawant and Mr. R.M. Sawant. A.G.P. have appeared for respondent No. 1. Mr. A.K. Abhyankar has appeared for respondent No. 2.

4. Before we proceed further with the averments made in the petition as also the statements made in the replies and the rejoinder, it is necessary to note that initially when the petition was admitted, an ad-interim order in terms of prayer Clause (c) came to be granted by a learned single Judge on this petition on 12th August 1987. At that time, such matters were heard by a single Judge under the then prevalent rules of business of the High Court (Original Side). The learned single Judge granted that ad-interim relief with a rider that the petitioners will give a personal bond for differential amount of excise duty, i.e. Rs. 13/- per proof litre. A statement was also made by the counsel for the petitioners that the distillery, where the manufacturing process was being carried on, was neither mortgaged nor hypothecated nor in any way encumbered and that it shall not be mortgaged or encumbered. When the matter subsequently came up before the learned single Judge for confirmation of the ad-interim order on 24th August 1987, the learned counsel appearing for the State Government made a statement that the impugned notification dated 17th July, 1987 shall not be given effect to and/or implemented so far as the petitioners are concerned pending the final hearing and disposal of the writ petition. Much later on, the State Government was relieved of this statement when the matter was heard by a Division Bench consisting of P.D. Desai, C.J. (as he then was) and Kapadia, J., on 15th June 1992. As far as the effect of that order is concerned, it is relevant to note that when the matter was carried to the Apex Court, in the order passed on 24th July 1992 in SLP No. 8316 of 1992, the Apex Court observed -

"..... It must be noted that the order of 24-8-87 does not say that the ad-interim relief will continue presumably because of the assurance given by counsel....."

The Apex Court also directed that the interim relief be heard at the earliest. In any event, what is relevant to note is that thereafter there was no interim protective order and in fact the petitioners discontinued the production of the country liquor from Mhowra flowers from 1st July 1992.

5. Mr. Bhat, learned counsel for the petitioners, submitted that the cost of production of the country liquor from Mhowra flowers was much more than the liquor manufactured with molasses as a base and this aspect had not been taken into consideration by the State Government while issuing the impugned notification. He submitted that all throughout the excise duty on the country liquor manufactured with Mhowra flowers as an ingredient was never so steep and now under the impugned notification it was being clearly doubled. In his submission, the dissimilar producers are being treated similarly. He also

submitted that this was probably to help the liquor manufacturers who were using molasses as a base by which he meant the sugar factories. He pointed out that apart from the petitioners, there was only one other distillery situated in District Dhule which was using Mhowra flowers as a base. Mr. Bhat submitted that these flowers were available in hilly areas and good number of tribals were engaged in collecting these flowers and also that the factory of the petitioners provided employment to about 135 tribals.

6. The submission of Mr. Bhat was that the provision of the Constitution under Article 19(1)(g) gets infringed since this steep rise operates as a restriction on petitioners right to carry on their trade and business. Besides, inasmuch as there was no rational explanation as to why there was such a steep rise. Article 14 was also offended. He submitted that this increase was arbitrary and for that reason also it would be hit by Article 14. Mr. Bhat relied upon two judgments of the Apex Court. Firstly in the case of Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, and stressed the observation in para 7 thereof wherein the Apex Court has observed as follows :

"The guarantee of equal protection of the laws must extend even to taxing statutes. It has not been contended otherwise. It does not mean that every person should be taxed equally. But it does mean that if property of the same character has to be taxed, the taxation, must be by the same standard, so that the burden of taxation may fall equally on all persons holding that kind and extent of property. If the taxation, generally speaking, imposes a similar burden on every one with reference to that particular kind and extent of property, on the same basis of taxation, the law shall not be open to attack on the ground of inequality, even though the result of the taxation may be that the total burden on different persons may be unequal. Hence, if the Legislature has classified persons or properties into different categories, which are subjected to different rates of taxation with reference to income or property, such a classification would not be open to the attack of inequality on the ground that the total burden resulting from such a classification is unequal. Similarly, different kinds of property may be subjected to different rates of taxation, but so long as there is a rational basis for the classification, Article 14 will not be in the way of such a classification resulting in unequal burdens on different classes of properties."

He then relied upon another judgment of the Apex Court in Indian Express Newspapers (Bombay) P. Ltd. v. Union of India, and particularly para 73 thereof, The paragraph is mainly on the principles to be applied while examining subordinate legislation and the Apex Court has held that where the subordinate legislation is manifestly arbitrary, the court can certainly look into it. The relevant part of the paragraph reads as follows :

"A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition, it may also be questioned on the ground that it does

not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute, That is because subordinate legislation must yield to plenary legislation, It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary."

7. In the reply filed on behalf of the State of Maharashtra, principally the defence is four fold. Firstly, it is stated that what the petitioners are doing is to blend the liquor manufactured from Mhowra flowers with the liquor manufactured from molasses and it is in fact 80% molasses with which 20% Mhowra product is added. The first submission of the State is that thereby the petitioners are getting excessive profits by resorting to blending. The second submission in the affidavit is that as far as the price of country liquor from the base other than molasses is concerned, the same is not controlled and therefore the petitioners are charging their own price to the wholesalers, retailers or consumers. Then it is pointed out by giving an example as to how the duty on a bottle of 100% molasses based alcohol and the petitioners blend of alcohol in a bottle is approximately the same, which is his third submission. Fourthly, it is submitted in the affidavit in reply that a detailed study of the issues involved was made and the results of the study were considered and, after examining the report, the proposals were formulated. It is submitted that the impugned rates have been fixed more or less to bring about the parity in the two categories of country liquor.

8. Mr. Bhat, learned counsel for the petitioners, pointed out that these submissions of the State in the affidavit of Shri Ratnaparkhe, Joint Secretary, Home Department, are contradicted by the material of the government on record. He referred to those documents which are enclosed to the affidavit in rejoinder filed by the 2nd petitioner. Thus Mr. Bhat referred to the report made by various officers of the Finance Department, particularly the one which is annexed at Exhibit-1. In that, it is accepted that the cost of production of country liquor with Mhowra flowers as an ingredient is high. It is also stated in that report that the liquor manufactured from cashew and Mhowra spirit are placed in disadvantageous position. In that report, there is also a reference to the idea of merging sales tax with excise duty and still it is submitted that considering the overall position, the excise duty on Mhowra country liquor and cashew country liquor may not be increased. The said view is also supported by Deputy Secretary finance in his report at Exhibit G-1 to this rejoinder. Thus Mr. Bhat submitted that there is in fact an admission on the part of the State with respect to cost difference because of which the price of Mhowra liquor is higher. He also referred to the fact that the submission by the State Government that a study was made by it prior to the impugned decision has been subsequently given up. It is however stated by the respondents that their decision on the basis of the material that was before them. This is seen from the reply filed by the State Government to a notice of motion wherein such an averment is made.

9. Mr. Abhyankar, learned counsel for the 2nd respondent, submitted that some

135 employees were working in this distillery in 1987 and a larger number of tribals are engaged in collecting these flowers. He drew our attention to some of the exhibits on record like a letter from the Member of Parliament, from the particular area and also the report from the office of the Labour Commissioner. Mr. Abhyankar submitted that employment is available to these tribals through this distillery and since distillery is closed in the year 1992, their bread has been snatched away from them. He submitted that on that count also, this court ought to interfere and set aside the impugned notification.

10. Mr. C.J. Sawant, learned counsel appearing for the 1st respondent - State Government, submitted at the outset that this levy on the manufacturer imposed u/s 105 of the Prohibition Act is passed on to the consumers. The end price is not controlled by the State and since transfer of this levy is permissible to the consumers, in fact there is no serious prejudice to the petitioners. With respect to the submission of Mr. Bhat that the cost of producing the liquor with Mhowra as a base is higher. Mr. Sawant drew our attention to a chart on record which showed that it is for the first time by the impugned notification that a near parity was sought to be brought about. The chart annexed to the affidavit of Shri Ratnaparkhi is reproduced hereinbelow.

CHANGES IN THE RATES OF DUTY ON COUNTRY LIQUOR

Date Country liquor manufactured purely from spirit distilled from molasses.
Country liquor manufactured (i) spirit distilled from bases other than molasses
and (ii) by blending spirit distilled from two or more bases.

Rupees per proof litre Rupees per proof litre

1-4-1973 Rs. 5.00 -Nil-

7-3-1975 Rs. 4.20 p. Rs. 9.00

23-3-1977 Rs. 10.30 p. -Do-

8-12-1977 Rs. 4.20 p. -Do-

8-3-1979 Rs. 5.00 -Do-

10-3-1981 Rs. 5.50 p. -Do-

5-12-1981 Rs. 8.00 -Do-

22-12-1981 Rs. 6.75 p. -Do-

13-3-1982 Rs. 7.25 p. -Do-

1-1-1983 Rs. 8.00 -Do-

1-6-1985 Rs. 11.00 -Do-

23-6-1985 Rs. 12.00 Rs. 13.00

2-4-1986 Rs. 20.00 -Do-

14-1-1987 Rs. 33.00 -Do-

18-7-1987 Rs. 25.00 Rs. 26.00

Mr. Sawant submitted that as can be seen from this chart, all throughout from 1973 onwards until 1st June 1985 the excise duty on the liquor manufactured from Mhowra was higher than the one manufactured with molasses as the base. That position continued until 2nd April 1986 except for a short period between 1st June 1985 and 23rd June 1985. Now the State has sought to bring about almost a parity between the two products. Besides, with respect to various reports on the record of the State Government indicating divergent opinions. Mr. Sawant submitted that this in fact indicated that a difference of opinions did exist in the department, but it was for the State Government to accept one of them and which is what the State Government has done. Acceptance of an opinion out of various opinions, which were available with the State Government, cannot amount to a non-application of mind or that the decision is an irrational one. Mr. Sawant submitted that it is true that contrary opinions have been expressed, but at the same time the department has taken a conscious decision to bring about the parity and considering the fact that this is a taxing statute, the courts have to be slow while examining the decisions taken by the State. We are concerned here with the exercise of power by the State and in that we have to see whether the State has in any way acted arbitrarily.

11. Thereafter in support of his submissions Mr. Sawant referred to a number of judgments of the Apex Court. Firstly he relied upon a judgment in the case of Avinder Singh and Others Vs. State of Punjab and Others, and particularly para 5 thereof. Thereinafter referring to the earlier referred judgment in Moopil Nair's case, the Apex Court observed -

"May be in marginal cases where the virtual impact of irrationally uniform impost on the same subject is glaringly discriminatory, expropriatory and beyond legislative competence different considerations may arise, but to condemn into invalidity a tax because it is levied at a conveniently flat rate having regard to the commodity or service which has a high range of prices and the minimal effect on the overall price, its easy means of collection and a variety of other pragmatic variables. Is an absurdity, especially because in fiscal matters large liberality must be extended to the Government having regard to the plurality of criteria which have to go into the fiscal success of the measure. Likewise, picking and choosing within limits is inevitable in taxation."

Thereafter he referred to another judgment in Sri Srinivasa Theatre and Others Vs. Government of Tamil Nadu and Others, and particularly paras 11 and 13 thereof. Therein the Apex Court has observed that taxation is a recognised fiscal tool to achieve fiscal and social objectives. In para 14, the court observed -

"Validity of Legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the court may ultimately find and more especially by what may be gathered from what the legislature has

itself said."

12. Thereafter coming to the grievance of the alleged infringement of Article 19(1)(g). Mr. Sawant submitted that application of this, Article to measures of prohibition has been specifically ruled out by the Apex Court. He referred to the judgment of the Apex Court in M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others, . In para 13 thereof the Apex Court has observed -

"That there is no fundamental right to trade in intoxicants, like liquor has been conclusively held by this Court in State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc., ."

In the very report, the Apex Court has referred to the observations in the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, , where in para 47 the learned Chief Justice has in terms summed up the view of five Constitution Benches as follows -

"47. These unanimous decisions of five Constitution Benches uniformly emphasised after a careful consideration of the problem involved that the State has the power to prohibit trades which are injurious to health and welfare of the public, that elimination and exclusion from business is inherent in the nature of liquor business, that no person has an absolute right to deal in liquor and that all forms of dealings in liquor have, from their inherent nature, been treated, as a class by themselves by all civilised communities. The contention that the citizen had either a natural or a fundamental right to carry on trade or business in liquor thus stood rejected."

13. To counter the submission of Mr. Sawant, Mr. Bhat referred to the order passed by the Apex Court on 1st September 1989 in SLP No. 9476 of 1989 arising from this very matter, wherein this submission was advanced on behalf of the State and the Apex Court had observed as follows:

"The second submission that since a trade in intoxicants is an inherently deleterious and pernicious one; that accordingly, no citizen can assert a fundamental right to carry on such a trade and that, therefore, the discretion of the State in dealing with the distribution of such things is unfettered suffers from a basic fallacy. It is true that regulation of things *res extra commercium* could take the form of a total prohibition. But where, as here, the State permits a trade in liquor and proceeds to deal with it, all the constitutional limitations on State action are attracted and the State must so regulate its action as not to transgress the constitutional drill and discipline. It cannot, for instance, deal with the matter in a manner violative of Article 14."

Thus as seen from that paragraph, it is observed that for instance the court can deal with the matter where there is a violation of Article 14. Mr. Bhat submitted that Article 14 is mentioned only as an instance and Article 19(1)(g) would still be available. It is not possible to accept this submission. As far as Article 19(1)(g) is concerned, as we have noted above in the number of judgments including

those of Constitution Benches, the Apex Court has clearly held that the said Article is not available when a trade is of intoxicants.

Lastly, Mr. Sawant referred to a judgment of the Apex Court in the case of Municipal Council, Kota, Rajasthan Vs. The Delhi Cloth and General Mills Co. Ltd., Etc. Etc., and particularly the observation that once the legislature concerned has been held to possess the power to levy the tax, the motive with which the tax is imposed becomes immaterial and irrelevant and fact that a wrong reason for exercising the power has also been given would not in any manner derogate from the validity of the tax.

14. Having heard the counsel on both sides, we are of the view that as held by different Constitution Benches from time to time, Article 19(1)(g) is clearly not available to the petitioners. As far as Article 14 is concerned, merely because the cost of production of the liquor with Mhowra as the base is higher, the same cannot be pressed into service to contend that dissimilar producers are being treated similarly and that a concessional rate ought to be always given when it comes to excise duty on the liquor manufactured from Mhowra. Merely because there are certain factors which the State has on its record supporting the standpoint of the petitioners, that by itself cannot lead to the inference that the contrary decision of the State is irrational. There are factors such as blending which is resorted to by the petitioners because of which there were excessive profits and since it is a matter of taxation, it is for the State to decide at what point of time and where there ought to be alteration in the tax schedule. This is what has been done in the instant case. As far as the effect on the tribals is concerned, Mr. Sawant has brought to our notice a recent notification of the State Government issued under the Bombay Prohibition (Mhowra Flowers) (Prescribed Limit in Weight) Rules, 1963 wherein under Rule 2 thereof, Mhowra flowers upto the limit of 25 kg. in respect of certain tribal areas are permitted to be utilised for production of their own consumption by the tribals. This notification includes some of the tehsils in Thane District wherein the petitioners distillery is situated. Thus Mr. Sawant submitted that as far as the tribals are concerned, for their own consumption a production by themselves upto 25 kg of Mhowra flowers is specifically exempted. This is exempted from any excise duty or penal action. The view of the State in this behalf has been that it is a traditional drink consumed by tribals and therefore the above decision has been taken. However, as far as the production from the distillery is concerned, Mr. Sawant submitted that the State has to consider the aspect of the profits earned by the manufacturer. Only after considering the fact that blending is resorted to and also that the excise duty can be transferred to the consumers, that the particular decision has been taken. Besides, as pointed out above, practically until 2nd April 1986 all throughout the excise duty for Mhowra flowers base liquor was always high. Hence merely because the present rise in duty is going to affect the production of the petitioners, it cannot be said that the action of the State is arbitrary, irrational or without any basis or that it amounts to treating dissimilar parties similarly so as to attract Article 14 of the Constitution. In this

view of the matter, in our view, the challenge on the basis of Article 14 is also misplaced.

15. It has also been contended in the petition that the impugned action is with a view to single out the petitioners. Mr. Bhat submitted that this submission was on the footing that the petitioners are the only sufferer under the impugned notification. However, no mala fides as such are alleged with respect to the impugned notification. Now as far as the effect of a particular State action is concerned, it is immaterial whether one person is affected or larger number of persons are affected and for that one cannot say that the action is in any way arbitrary.

16. Mr. Sawant pointed out to us that during the period when the factory was working, i.e. until 30th June 1992, the excise duty which was payable and which was not paid to the State (because of the stay which was operating in the meanwhile), came to a staggering figure of Rs. 35,35,11,891.51. He submitted that if the petition is not to be entertained, the respondents ought to be permitted to collect this amount and in fact the petitioners must make it good since they had obtained interim relief and on the basis of which this amount was not recovered by the State. To advance his submissions, Mr. Sawant referred to the judgment of the Apex Court in *Agricultural and Processed Food Products Vs. Oswal Agro Furane Ltd. and others*, and submitted that a party which takes the benefit of a court order is liable to pay the difference once the matter is decided finally against the concerned party. Having taken the advantage of the interim order, the liability to pay would revive once the interim order is no longer available. In this behalf he also referred to a judgment of the Apex Court, in *M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another*, wherein the Apex Court levied an interest at the rate of 15% when finally the interim relief was no longer operative.

17. Mr. Sawant drew our attention to the fact that Section 114 of Bombay Prohibition Act, 1949 has been subsequently amended with effect from 18th May 1998 and from that date if the excise duty is not paid within the due date or the prescribed period it has been made recoverable with simple interest at the rate of 2% per month. In the circumstances, the State would be entitled to interest until 18th May 1998 at the rate of 15% per annum and at the rate of 2% per month thereafter, as per the provision of Section 114(2).

18. Mr. Bhat, learned counsel for the petitioners, submitted that the production of liquor had been undertaken by the petitioners during the period the statement made by the respondents was available to the petitioners i.e. until they were relieved of that statement by the above referred order passed by the Division Bench presided over by P.D. Desai, C.J and S.H. Kapadia, 3. His submission was that the State also has benefited by levying whatever was the excise duty during that period excluding the impugned enhanced rate. This is because the production also went up during that period and therefore this amount should not be charged on the petitioners even if the petition is finally not entertained, in this

behalf, some submissions were advanced by both the counsel with respect to the undertaking given by the petitioners. As far as that part is concerned, it is clear from the observations of the Apex Court that the ad-interim order passed on 12th August 1987 did not survive beyond 24th August 1987. That being so, there is no question of there being any responsibility based on the basis of personal bond which was then given by the petitioners on the basis of the order of 12th August 1987 and which was subsequently withdrawn. Mr. Bhat has however accepted that the factory of the petitioners is not mortgaged nor was any encumbrances created based thereon. The State can recover its dues by following the due process as against the factory of the petitioners amongst others.

19. In the circumstances, since we have held that the impugned notification does not suffer from any vice as alleged by the petitioners the petition must fail and the same is accordingly dismissed with costs. It would be open to the respondents to recover the arrears of excise duty by taking steps which are available to them including against the factory of the petitioners. They will be entitled to recover the due amount with interest at the rate of 15% per annum until 18th May 1998 and at the rate of 2% per month thereafter until realisation.