
(2022) 03 GAU CK 0053
In the Gauhati High Court
Case No : Criminal Petition No. 490 Of 2021

M/S. Norphel Winery And Anr.

APPELLANT

Vs

State Of Assam And 6 Ors

RESPONDENT

Date of Decision : 30-03-2022

Acts Referred:

Assam Excise Rules, 2016 — Rule 338, 338A
Code Of Criminal Procedure, 1973 — Section 154, 190, 482
Assam Excise (Amendment) Act, 2018 — Section 3(21), 53(1)(a), 53(1)(e)
National Highway Act, 1956 — Section 4
Assam Excise Act, 2000 — Section 42, 43

Citation : (2022) 03 GAU CK 0053

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : T. Pertin, U. Pathak, H.K. Das., P.N. Goswami, K.P. Pathak, R.R. Gogoi

Judgement

1. By filing this petition under Section 482 of the CrPC, the petitioners have sought for quashing and setting aside the proceeding in connection with the Dibrugarh P.S. Case No.66 [Excise] /2021, corresponding to DBR[S] Circle Case No.36/2021, registered under Section 53(1)(a) of the Assam Excise (Amendment) Act, 2018 and also for a direction to the State of Assam not to harass or intercept any goods making inter-state transportation through the National Highways within the State of Assam.

2. Heard Mr. T. Pertin, learned counsel for the petitioners. Also heard Mr. P. N. Goswami, learned Standing Counsel, Excise Department, Assam and also gone through the materials available in the case record.

3. The case of the petitioners are that the consignment of Kiwi Wine, belonging to M/s. Norphel Winery, was being carried from Dirang to Khonsa of Arunachal Pradesh, in the Bolero Pick Up Van, bearing Registration No. AS-12-BC-6235, through Assam and it was apprehended by Excise Department of Assam, near Bogibil Bridge where the vehicle and the consignment was seized. According to

the petitioners, as there is no direct road connectivity between Khonsa and Dirang in Arunachal Pradesh, the vehicle used the National Highway in Assam. The only ground on which seizure of the vehicle and the consignment was made, due to discrepancy in quantity of stock being carried, with the challan and absence of the batch number and manufacturing date in the bottles. It is contended that even if the allegation made in the complaint and forwarding report is taken at their face-value, the same failed to make out even a prima-facie case under Section 53(1)(e) of the Assam Excise Act.

4. Mr. Pertin, the learned counsel for the petitioners submits that the petitioners have hired the vehicle on daily basis and hire charges are being paid by them, who is a petty entrepreneur, and that the seized consignment are also lying unattended since the date of seizure on 18.07.2021, and if not released, the same will perish. Therefore, Mr. Pertin, the learned counsel for the petitioners, prayed for releasing the seized Kiwi wine and also the vehicle and to stay further proceeding of the case.

5. Mr. Pertin, the learned counsel for the petitioners, has referred to the decision of *Sunderbhai Ambalal Desai Vs. State of Gujarat* [Special Leave Petition (crl.) 2745 of 2002], in support of his contention.

6. The limb of arguments of the learned counsel for the petitioners, can be summarized as follows :-

(i) As regards seizure of the Kiwi Wine, it is submitted that the wine produced by M/s. Norphel Winery are sold within the State of Arunachal Pradesh, for which the materials had to pass through the National Highway, situated in Assam for supply to the transit locations in the State of Arunachal Pradesh. In the present case, M/s. Norphel Winery had dispatched the consignment of Kiwi Wine from Dirang in Arunachal Pradesh, to M/s. East Beverages at Khonsa, in Tirap District, with the challan bearing No.30, dated 16.07.2021, for Kiwi Wine – 30 cases of 750 ML and 20 cases of 375 ML, in the Bolero Pick Up Van, bearing Registration No. AS-12-BC-6235 and due to the lack of road communication, the consignment had to be transported to Khonsa via Assam and the said consignment was not for sale in Assam and such goods were not transported or moved from one place to another place within the State of Assam.

(ii) Regarding the documents pertaining to the consignment, it is submitted that the driver had produced two documents, one issued by the Asstt. Commissioner of Excise Department, Govt. of Arunachal Pradesh, dated 12.07.2021, allowing M/s. Norphel Winery to transport/sale Kiwi wine of 375 ML (144 cases) and of 750 ML (26 cases) in Tirap District and the second document was issued by M/s. Norphel Winery, dated 16.07.2021, showing 20 cases of 375 ML and 30 cases of 750 ML Kiwi wine.

(iii) It is further contended that there was a typographical error in the letter issued by the Asstt. Commissioner of Excise Department, Govt. of Arunachal Pradesh, whereas the permit showing 20 cases of 375 ml and 30 cases of 750 ml

is the correct one.

(iv) On the next, it is contended that the date of manufacture or the date of expiry of the wine is not required and hence, the question that it is fit or unfit for human consumption, does not arise. The Food Safety and Standards (Alcoholic Beverages) Regulations, 2018, provides that: "Rule 5.10 Alcoholic beverage other than wine which contain less than 10 per cent alcohol shall mention the date, month and year of expiry on the label, in that order and shall precede by the words "expiry date or use by". However, the manufacturer may use the expression "best before" as optional or additional information.

7. Accordingly, it is contended that both the grounds for detention and seizure does not attract the provision of Section 53(1)(a) of the Assam Excise Act. In any case, where there is discrepancies in the quantity, carried as per records or whether the Kiwi wine is free for consumption, are issues, to be dealt with by the Excise Department of State of Arunachal Pradesh and the Excise Department of Assam has no jurisdiction/ is not competent to look into such matter. More so, where the Kiwi wine are exempted from any tax in the State of Arunachal Pradesh, there is no reason for the petitioners to indulge in making false statement, describing the total materials being transported.

8. Referring to the provision of Section 53(1)(a) of the Assam Excise Act, 2018, it has been submitted that said proviso prescribes penalty for unlawful import, export, transport, manufacture, possession, sale, etc. of intoxicant. But the present case, only relates to the transport of consignment, does not itself attract the aforesaid provision, as the transportation was illegally carried out and only discrepancy about the amount in the challan has been raised, which cannot be a ground to attract the offence under the Assam Excise Act.

9. Reference has been made to the meaning of transport within the provision of Section 3(21) of the Assam Excise (Amendment) Act, 2018, which provides that "Transport" means to move from one place to another within the territories to which this Act applies. It has been urged that while the article was transported within the State of Arunachal Pradesh, with legal documents, via the National Highway in Assam, such search and seizure is bad in law.

10. Further, it is contended that at the time of such seizure, no any formal FIR or complaint was made as on 18.07.2021, as required under Sections 154/190 of the CrPC and only after seizure of the same, the formal complaint was filed on 20.07.2021, which has now been registered as the Dibrugarh P.S. Case No.66 [Excise] /2021, corresponding to DBR[S] Circle Case No.36/2021.

11. Only because the petitioners dispatched the goods to the destination via National Highway in Assam, the same cannot confer any jurisdiction upon the Excise Department of Assam, to register a case, when the petitioners have valid documents in their favour. It is further contended that the National Highway does not belong to the State of Assam, where it passes through; the National Highway

belongs to the Central Government.

12. In this context, Section 4 of the National Highway Act, 1956 has been referred, which reads as follows:-

4. National Highways to vest in the Union — All national highways shall vest in the Union, and for the purposes of this Act “Highways” include—

(i) all lands appurtenant thereto, whether demarcated or not;

(ii) all bridges, culverts, tunnels, causeways, carriageways and other structures constructed or across such highways; and

(iii) all fences, trees, posts and boundary, furlong and mile stones of such highways or any land appurtenant to such highways.

13. It is pleaded by the learned counsel for the petitioners that as the National Highway passes through a particular State at a particular portion, does not mean that, that part of Highway belongs to that State and the officials of that State has all the power to implement its law and rules, unless there are specific violation of those laws and rules. Accordingly, the petitioners contend that the seized wine, transporting from one place to another place of State of Arunachal Pradesh, through the National Highway via Assam does not violate any provision of law.

14. Controverting the contention raised by the petitioners, the respondent No.3 i.e. the Addl. Commissioner of Excise, Assam has filed the affidavit-in-opposition, wherein the respondent No.3 stated that on receipt of specific information, the Asstt. Inspector of Excise, Dibrugarh, apprehended the Bolero Pick Up Van, bearing Registration No. AS-12-BC-6235, carrying 50 cartoons of Kiwi wine. According to the respondents, the vehicle was carrying the excise goods, without any road permit or pass, in gross contravention of the Assam Excise Rules. During investigation, it is found that the invoice against the aforesaid wine cartons did not tally with the quantities, carried in the vehicle. In fact, against the said single consignment of wine, two separate invoices were produced: one bearing Invoice No.31, indicating 50 cases of wine being transported to one P.P. Wholesale, Aalo in Arunachal Pradesh and the other bearing Invoice No.108, indicating 167 cases of wine being transported to East Beverages, Khonsa in Arunachal Pradesh and both the invoices were dated 16.07.2021 and meant for different locations.

15. The respondents further contended that the driver of the seized vehicle identified himself as representative of M/s. Norphel Winery, who revealed that the vehicle was carrying 50 cartoons wine but was in possession of two separate invoices, which were issued against two different destinations, with different specific quantities.

16. According to the driver of the vehicle, he is the representative of M/s. Norphel Windery carrying 50 cases of wine but invoices produced indicates different destinations. On due communication to the Excise authority of

Arunachal Pradesh as to whether Kiwi wine can be transported without permit, it had replied that permit and pass is required for transportation of the said goods and no exemption is granted to the Kiwi wine and there is no response as regard the genuineness of the documents. On the other hand, the petitioners have produced another 3rd invoice dated 02.08.2021, which reveals that 50 cases of Kiwi wine can be transported vide Annexure-C, D and E. Further, it contends that wine bottle did not have any batch number etc., which raises suspicion whether it is fit for human consumption. That being so, the consignor failed to produce any valid documents to certify that the consignments was transported legally. It is stated that the contention of the petitioners is not tenable, inasmuch as Sections 42, 43 of the Excise Act of 2000 authorises the excise officials to invoke the power under provision of CrPC to investigate any offence during transport.

17. During the investigation, sample of seized wine was sent to State Public Health Laboratory, Assam for examination and after getting the report, the petitioners' side has filed the additional affidavit along with the report given by Food Analyst, Government of Assam. In the said report, it has been stated that the sample is an alcoholic liquor and the alcoholic strength is 12.22% and sample does not conform to the prescribed of Food Safety and Standards (Alcoholic Beverages) Regulation, 2011. The sample is misbranded and unsafe for human consumption vide Annexure-1 to the additional affidavit filed by respondent no.3.

18. The petitioners filed rejoinder to the affidavit-in-opposition contending that the anomalies in the invoices have been clarified by the Excise Department in its reply dated 05.10.2021. It is stated that while the Kiwi wine is exempted from taxes in the State of Arunachal Pradesh, therefore there is no reason for the petitioners to indulge in making false documents describing false materials being transported, discrepancies, if any, is stated to be bona fide.

19. The learned counsel for the petitioners Mr. T. Pertin has submitted that the petitioners' company has all the valid documents like, transit pass to transport the said wine and in view of the recent notification of the Excise Department dated 29.09.2021, where Rule 338A has been inserted after Rule 338, the petitioners cannot be held liable after amendment of such Assam Excise Rules, 2016. For ready reference, Section 7 is quoted below:

"In the principal rules after Rule 338, the following new Rule 338A shall be inserted, namely:-

338A. (1) if any consignment of liquor being transported from place outside the State and is bound for any place outside the State and in course of such movement passes through the State, the consignor, driver or the transporter shall make a declaration that liquor being so transported shall not be unloaded, delivered or sold in the State and shall obtain a transit pass in Annexure-1 which shall be carried and produced before the excise officer during its movement. The holder of such Transit Pass shall get the consignment verified and endorsed by the Superintendent of Excise or any other authorized Excise officer of the district

which the destined exit point is located, before its exit from the State.

(2) (i) In checking points for the purpose of checking of transit of spirit/liquor, at entry and exit level, the driver or the transporter shall get the consignment verified and obtain endorsement with the seal and signature of the excise officer at the exit check point, as proof of such exit from the State.

(ii) If the driver or transporter fails to submit the transit pass within the stipulated hours of leaving the first entry checking point falling enroute, it shall be deemed that liquor so transported have been sold or disposed of within the State of Assam and shall be liable for penalty and prosecution as per the provisions of the Act.

(iii) The verified and endorsed copy of the transit pass shall be produced/ surrendered within ten days from the date of issue before the Officer-in-charge of entry checking point."

20. Further, in support of the contention that there is no necessity for labeling about the date, month and year etc. of the manufacturer of wine, the provision of Food Safety and Standards (Alcoholic Beverages) Regulations, 2018 has been referred. It is stated that the Kiwi wine is not required to disclose the date of manufacturer etc. as per Section 5.10 of the of the above rules, which reads as follows:-

"5.10. Alcoholic beverages other than Wine which contain less than 10% alcohol shall mention the date, month and the year of expiry on the barrel in that order and shall preceded by the words expiry date..... or use by.....

However, the manufacture may use expression "best before" as optional or additional information."

21. Thus, it is contended that in view of the express provision that there is no necessity to declare all above and also the fact that transportation of wine is not illegal having valid permit, initiation of proceeding under Section 53(1)(a) of the Assam Excise (Amendment) Act, 2018 is not proper and more so, the seized article was not intended for sale in Assam. It has been contended that within the purview of aforesaid Act and rules, the word transport means to move one place to another place within the territories to which the Act applies.

22. So far as regard the discrepancy in the permit, the official communication by the office of the Commissioner, Tax, Excise & Narcotics, Itanagar 01.10.2021, has clarified all the matters. The counsel for the petitioners has also accepted about receipt of reply/response so furnished by the Excise Department, Itanagar to their office. The aforesaid letter appears to be subsequently issued by the aforesaid office and for better appreciation of the matter, it is necessary to reproduce the same, which is as under:

"GOVERNMENT OF ARUNACHAL PRADESH

OFFICE OF THE COMMISSIONER, TAX, EXCISE & NARCOTICS.

No. Ex-15/2016-17/Btl/36409 Dated Itanagar the 1st October 2021

To,

Sri. Neel Kamal Pathak

Inspector of Excise cum IO

Office of Inspector of Excise, Dibrugarh Sadar.

Dibrugarh, Assam.

Reference: Your letter No Nil dated 06.08.2021 and 23.09.2021 and Excise Case No.66/2021

Subject:- Furnishing of Report regarding consignment of Kiwi wine by M/s. Norphel Winery.

Sir,

With reference to your query vide letter dated 06.08.2021 and 23.03.2021, I beg to furnish the following information as requested.

1. As regard point no.1, it is a fact that the office of the Excise Department, Itanagar had issued a letter dated 12.07.2021 mentioning the quantities of Wine being transported by M/s. Norphel Winery to East Beverages, Khonsa as 141 cases of 375 ML and 26 cases of 750 ML of Kiwi Wine. This letter was inadvertently issued due to oversight and a mess up in the office. The figure mentioned about the number of cases being carried was not correct.

It is also a fact that another letter No. EX-15/2016-17/Btl/35 dated 12.07.2021 correctly mentioning the number of cases of Kiwi Wine as – 375 ML – 20 [twenty cases] and 750 ML – 30 [thirty] cases was issued to M/s. Norphel Winery for supply to East Beverages, Khonsa, Arunachal Pradesh which is genuine and may kinely be treated as authentic.

2. As regards point no.2, the Kiwi Wine as – 375 ML – 20 [twenty cases] and 750 ML– 30 [thirty] cases under letter No. EX-15/2016-17/Btl/35 dated 12.07.2021 is for supply to M/s. East Beverages, Khonsa, Arunachal Pradesh and this office has no information regarding the vehicle by which the materials were transported.

3. As regards point no.3, under the Arunachal Pradesh State Wine Policy, 2015; any form of taxes is exempted for sale and distribution of wine produced from the local horticultural fruits within the State of Arunachal Pradesh and as the said policy has not been yet made consistent with the AP Excise Act, no any Excise Officer is posted in the Kiwi Winery/manufactory or Warehouse. Presently, as an incentive to the local growers and entrepreneurs, any form of taxes is exempted within the State of Arunachcal Pradesh under the Arunachal Pradesh State Wine Policy, 2015.

4. As regards your point no.4, it is to state that the wines are being transported

from one destination of Arunachal Pradesh to another destination of Arunachal Pradesh via the National Highways which may pass through the State of Assam for which the Bill, challan etc issued by the winery and the excise officer are valid. Further, if any abrasion or omission punishable under the Assam Excise Act '2000 as amended in 2018, it is for the Excise Department of Govt. of Arunachal Pradesh to look into the matter. The Excise Department of Assam may decide whether transporting wine from the State of Arunachal Pradesh to another destination of Arunachal Pradesh via Assam with or without letter/ permit from excise office of Arunachal Pradesh would attract the provisions of Assam Excise [Amendment] Act '2018.

5. As regards your point no.5, it is to clarify that under Part 5, Section 5.10 of the Food Safety and Standards [Alcoholic Beverages] Regulation '2018 it is not necessary to imprint manufacturing date and batch number on the labels of any Wine. However, we shall request M/s. Norphel Winery to imprint certain information on the label.

This is for your kind information and reply to the above letters.

Yours faithfully,

Sd/-

[Kikin Tagi]

Assistant Commissioner [Excise]

Department of Tax, Excise & Narcotics,

Govt. of Arunachal Pradesh,

Itanagar

23. The aforesaid letter issued by the Excise Department 01.10.2021, which has been brought on record by the petitioners' side by way of rejoinder affidavit, has not been disputed by the respondents' side. That being so, the contention raised by the respondents' side that the authenticity of the document produced by the petitioners' side is not yet ascertained, cannot prevail. The aforesaid letter has addressed all the issues that has been raised by the respondent no.3/Excise Department, Assam. They have clarified the discrepancy that has occurred in different permits issued by the officials inadvertently and that being so, it can be summed up that there is no illegality while transporting the wine. The Department of Tax and Excise, Government of Arunachal Pradesh has also inclined to take necessary steps so far as regard the imprinting manufacturing date and batch number etc. in wine from their end.

24. The petitioners herein has contended that by complying the relevant Rules [Annexure-1 of Rule 338A], they are continuing their business after the new amendment, and the Government has also encouraged the local farmers to produce horticultural fruits as per the Arunachal Pradesh State Wine Policy, 2015

and the M/s. Norphel Winery has been provided Excise Licence on 04.05.2017 for 10 years and for such encouraging, they are also exempted from payment of Excise Duty, Sales Tax/VAT and Label registration fee under the said policy.

25. In view of the stand taken by the Government of Arunachal Pradesh who has allowed the new entrepreneurs to run the business of Kiwi Wine, which is a local produce and whereas they have accepted the authenticity of document relied by the petitioners' side and whereas the aforesaid wine was not meant for sale in the State of Assam, rather it was transported from one place to another place within the Arunachal Pradesh, this court is of considered view that the initiation of proceeding by the Assam Excise Department holds no good. Resultantly, the proceeding pertaining to Dibrugarh P.S. Case No.66 [Excise] /2021, corresponding to DBR[S] Circle Case No.36/2021, registered under Section 53(1) (a) of the Assam Excise (Amendment) Act, 2018 is hereby quashed and set aside with a direction to the Excise Department, Arunachal Pradesh to take necessary action in accordance with law in compliance of the provision of the Act. The seized vehicle along with wine cases/cartoons be released in favour of the petitioners forthwith.