

(2019) 02 MP CK 0061

In the Madhya Pradesh High Court

Case No : Writ Petition No. 8647 Of 2012

M/s Skol Breweries Ltd

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 20-02-2019

Acts Referred:

Constitution Of India, 1950 — Article 19(1), 19(1)(a) To (g), 19(2), 19(3), 19(4), 19(5), 19(6), 47, 301
Madhya Pradesh Beer And Wine Rules — Rule 4(3), 14, 16
Foreign Liquor Rules, 1996 — Rule 8(1)(j)
Madhya Pradesh Excise Act, 1915 — Section 2(2), 13, 14, 25, 27A, 28(1), 62, 62(2)(a), 62(2)(d), 62(2)(e), 62(2)(f), 62(2)(g), 62(2)(h)

Citation : (2019) 02 MP CK 0061

Hon'ble Judges : Sanjay Yadav, J; Vivek Agarwal, J

Bench : Division Bench

Advocate : Akshay Sapre, Gaurav Sharma, Praveen Newaskar

Final Decision : Dismissed

Judgement

[1] Petitioner, a company incorporated under the Companies Act, 1956 is engaged in the manufacture of Indian made Foreign Liquor.

[2] For the purpose of manufacture of beer, one M/s Tripti Alcobrew Ltd., Banmore, Morena, sub-lessee of the present petitioner, was granted license under sub-rule (3) of Rule 4 of the Madhya Pradesh Beer and Wine Rules in Form B-3, known as B-3 license bearing No. 05/2008-09 for the period from 01/04/2008 to 31/03/2009 vide order dated 31/03/2008 by the Excise Commissioner, Madhya Pradesh. Besides other, one of the imperative conditions was that the licensee shall abide by the provisions of the Excise Act, 1915; rules made thereunder, conditions of the B-3 license and all directions issued by the Excise Commissioner, Madhya Pradesh. It was further stipulated in B-3 license that the licensee shall bottle only that beer which has been manufactured at the licensed premises. And that the licensee shall pay the bottling fee at prescribed rate.

[3] That said M/s Tripti Alcobrew, sub-lessee of present petitioner was also granted special bottling license under Clause (j) of sub-rule (1) of Rule 8 of the Foreign Liquor Rules, 1996, on 31/03/2008 for the period from 01/04/2008 to 31/03/2009 known as F.L.9-A license No. 02/2008-09 for manufacture/ bottle specified/ listed in Schedule II for it is duly and specially franchised/ authorized by sub-lessee M/s Skol Breweries Ltd. Bangalore the owner of such labels/ brands or the labels brands belong to or are owned by the licensee himself and foreign liquor of the labels or brands listed in Schedule II was or is already being manufactured anywhere outside Madhya Pradesh. The licensee under F.L.9-A license under condition number 8 thereof was at liberty to procure Beer from any B-3 licensee of Madhya Pradesh or may be permitted to import spirit/beer by the Excise Commissioner for manufacturing the scheduled brands of foreign liquor including beer. The licensee was also permitted to import specially blended/ flavoured spirits/ beer for belonging purposes. The licensee was to pay the bottling fee according to the prescribed rates.

[4] That Excise Commissioner, Madhya Pradesh in exercise of the powers conferred on him under Section 28(1) of 1915 Act read with Rule 14 and 16 of the Madhya Pradesh Beer and Wine Rules, issued notification No. (60) B 1-99-07-2.V dated 28/03/2008 published in Madhya Pradesh Gazette dated 28/03/2008 brought in vogue w.e.f. 01/04/2008, in supersession of previous notification prescribing the bottling fee and export fee on Beer as below:-

S.N.

Item

Rate

(1)

(2)

(3)

1.

Bottling Fee on beer manufactured

Rs. 1.00 per bulk liter.

by local manufacturers on their
own brands.

2.

Bottling Fee on beer manufactured

Rs. 6.00 per bulk liter.

for consumption in the state by

manufacturers of national
status
under franchisee system or any
other system.

3.

Export fee on beer

Rs. 1.00 per bulk liter.

[5] That for the license period the petitioner was found paying bottling fee at the rate of Re. 1/- per bulk liter since 05/07/2008, by notice dated 19/12/2008 was called upon to pay the difference of Rs. 5 per bulk liter. By another communication dated 19/01/2009 the petitioner was required to pay the difference amount of Rs. 5 per bulk liter, aggregating to Rs. 20,21,643/- for the bottling done during the period from 18/08/2008 till 20/12/2008. A show cause notice was issued on 06/02/2009 calling upon the petitioner that being a beer manufacturer (Hurricane Super Strong Beer) of National Status, which attracts bottling fee Rs. 6/- per bulk liter whereagainst Re. 1/-per bulk liter being paid, to pay the difference, failing which, why the B-3 license be not cancelled. Petitioner filed a Writ Petition No. 1742/2009 against the demand raised. The Writ Petition was disposed of on 07/12/2009, whereby the matter was relegated to the Excise Commissioner, for his decision on the representation. The Excise Commissioner, after affording an opportunity of hearing passed the order on 31/03/2010, negatived petitioner's claim to pay Re. 1/- per bulk liter, holding the petitioner as manufacturer of National Status.

[6] Petitioner vide this petition, initially challenged the order dated 31/10/2010; later, vide amendment questioned the validity of Notification No. (60) B1-99-07-2.V dated 28/03/2008.

[7] The precise contentions in furtherance to challenge are that there is no guidance either under the Act of 1915 or the Rules made thereunder prescribing the parameters on the basis of which a particular manufacturer would qualify either as local manufacturer or a national level manufacturer. That Section 62 of 1915 Act only empowers State Government to inter alia regulate the amount, time, place and manner of payment of any duty or fee or tax or penalty. It is urged that the Rule 14 of the Rules only prescribes that the licensee shall pay bottling fee at such rate as may be prescribed by the State Government. The Rule it is urged does not classify a local or national manufacturer. The impugned notification being in exercise of power sub-delegated, such delegatee it is urged cannot act beyond the powers delegated, in other words, the sub-delegatee cannot create further class if there is no classification under the Rules. Reliance is placed on the decision in *Kishan Prakash Sharma and others Vs. Union of India and others* [(2001) 5 SCC 212] and *State of Rajasthan and others Vs. Basant*

Nahata [(2005) 12 SCC 77] to substantiate these contentions.

[8] It is further contended that the subject product i.e. Beer under the brand name 'Hurricane Super Strong Beer' being manufactured in the brewery situated in district Morena, Madhya Pradesh pursuant to B-3 license issued by the Commissioner, Excise and is being sold in the State of Madhya Pradesh, it is beyond the competence of the Authorities to charge for bottling at different rate.

[9] It is urged that the classification is totally misconceived in as much as it is based on the status and stature of the 'manufacturer' and not on the manufacture and sale of the licensed product. The scrutiny, it is urged, ought to be solely on the basis as to whether the licensed product is sold locally or nationally.

[10] Further contention on behalf of the petitioner is that the incidence of enhanced taxation cannot be precised upon the status or stature of the manufacturer. In that event it is urged only an entity is taxed and not the incidence/ product.

[11] On these contentions, petitioner seeks quashment of notification No. (60) B 1-99-07-2.V dated 28/03/2008 and the direction to respondent to charge at the rate of INR 1.00 per bulk liter.

[12] The State of Madhya Pradesh on its turn defend the validity of the impugned notification. However, it is observed from the record that after the amendment in Writ Petition challenging the validity of the impugned notification, the respondent/ State has chosen not to file additional return or seek consequential amendment. Be that as it may. The State is permitted to put forth their submissions qua the impugned notification.

[13] It is urged that it is within the competence of the State to charge bottling fee by classifying local manufacturer and the manufacturer of national status under the franchise system or any other system. Adverting to provisions contained under Section 25 of the Act of 1915 and Rules 14 and 16 of the Rules, it is urged that the State has been given wide discretion to classify the manufacturer of beer and charge at different rate. It is urged that M/s Skol Breweries Limited was owned by M/s Shaw Wallace and Company, which was later taken over by the SAB Miller. That M/s Shaw Wallace was the manufacturer of international status. It is contended that the petitioner which is granted B-3 license has its registered office located at Mumbai and have about 10 units throughout the country for manufacturing of Beer and its bottling. It is urged that the expression 'national status' denoted the status of manufacturer of establishing the manufacturing units in more than one State within the country. On these contentions, the respondents defend the impugned notification and the order dated 31/03/2006 passed by the Excise Commissioner.

[14] Considered rival submissions.

[15] It is not in dispute that B-3 licence No. 05/2008-09 under sub-rule (3) of

Rule 4 of the Madhya Pradesh Brewery and Wine Rules was granted on a prepayment of annual license fee of Rs. 8,00,000/-(Rupees Eight Lacs) to the petitioner, a sub-lessee of M/s Trapti Alcobrew Ltd. Banmore, District Morena, to manufacture and bottle beer at its brewery situated at District Morena. It is also not in dispute that in license, the address of the petitioner is shown as Jalahalli Camp Road, Yeshwantpur, Bangalore. It is also not in dispute that the petitioner manufactured and bottled the beer in question during the period under consideration.

[16] Madhya Pradesh Beer and Wine Rules are made by the State Government in exercise of the powers conferred by sub-section (1) and clause (a), (d), (e), (f), (g) and (h) of sub-section (2) of Section 62 of the Act of 1915. These clauses respectively empower the State Government to make rules:-

"(a) prescribing the powers and duties of Excise Officers;

(d) regulating the import, export, transport, manufacture, collection, possession, supply or storage of any intoxicant, or the cultivation of the hemp plant and may, by such rules among other matters-

(i) regulate the tapping of tari-producing trees, the drawing of tari from such trees, the marking of the same and the maintenance of such marks,

(ii) declare the process by which spirit shall be denatured and the denaturisation of spirit ascertained; and

(iii) cause spirit to be denatured through the agency or under the supervision of its own officers;

(d-I) regulating the import, export, transport, collection, possession, supply, storage or sale of Mahua flowers prescribing licences and permit therefor, throughout the State or in any specified areas or for any specified period;

(e) regulating the periods and localities for which, and the persons or classes of persons to whom, licences for the wholesale or retail vend of any intoxicant may be granted, and regulating the number of such licences which may be granted in any local area;

(f) prescribing the procedure to be followed and the matters to be ascertained before any licence for such vend is granted for any locality;

(g) regulation the amount, time, place and manner of payment of any duty or fee or tax or penalty;

(h) prescribing the authority by, the form in which, and terms and conditions on and subject to which any licence, permit or pass shall he granted, any by such rules, among other matters-

(i) fix the period for which any licence, permit or pass shall continue in force;

(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect

of any such licence, permit or pass;

(iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass for the performance of the conditions of the same,

(iv) prescribe the accounts to be maintained and the returns to be submitted by licence-holders; and

(v) prohibit or regulate the partnership in, or the transfer of, licenses."

[17] The present matter relatively turns on clause (g) of sub-section (2) of Section 62 which empowers the State Government to make rules regulating the amount, time, place and manner of payment of any duty or fee or tax or penalty. It must be remembered that trade in liquor is not a fundamental right. It is a privilege of the State. The State parts with this privilege for revenue consideration. It is therefore within the powers of the State to adopt any mode with a view to maximize its revenue; of course, the method adopted must not be discriminatory. It is held in *Khoday Distilleries Ltd. and others Vs. State of Karnataka and others* [(1995) 1 SCC 574]:-

"60. We may now summarise the law on the subject as culled from the aforesaid decisions.

(a) The rights protected by Article 19(1) are not absolute but qualified. The qualifications are stated in clauses (2) to (6) of Article 19. The fundamental rights guaranteed in Article 19(1)(a) to (g) are, therefore, to be read along with the said qualifications. Even the rights guaranteed under the Constitutions of the other civilized countries are not absolute but are read subject to the implied limitations on them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*, (outside commerce). There cannot be business in crime.

(c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commerce* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited.

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating

drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

(e) For the same reason, the State can create a monopoly either in itself or in the agency created by it for the manufacture, possession, sale and distribution of the liquor as a beverage and also sell the licences to the citizens for the said purpose by charging fees. This can be done under Article 19(6) or even otherwise.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res commercium*. The restrictions and limitations on the trade or business in potable liquor can again be both. under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to. sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(h) The State can adopt any mode of selling the licences for trade or business with a view to maximise its revenue so long as the method adopted is not discriminatory.

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article 47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

(j) The mere fact that the State levies taxes or fees on the production, sale and income derived from potable liquor whether the production, sale or income is legitimate or illegitimate, does not make the State a party to the said activities. The power of the State to raise revenue by levying taxes and fees should not be confused with the power of the State to prohibit or regulate the trade or business in question. The State exercises its two different powers on such occasions. Hence the mere fact that the State levies taxes and fees on trade or business in liquor or income derived from it, does not make the right to carry on trade or

business in liquor a fundamental right, or even a legal right when such trade or business is completely prohibited.

(k) The State cannot prohibit trade or business in medicinal and toilet preparations containing liquor or alcohol. The State can, however, under Article 19(6) place reasonable restrictions on the right to trade or business in the same in the interests of general public.

(l) Likewise, the State cannot prohibit trade or business in industrial alcohol which is not used as a beverage but used legitimately for industrial purposes. The State, however, can place reasonable restrictions on the said trade or business in the interests of the general public under Article 19(6) of the Constitution.

(m) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage."

[18] Chapter IV of 1915 Act deals with the provisions regarding manufacture, possession and sale of intoxicants. Section 13 prohibits manufacture or collection of intoxicants, subject to, licence issued by the State Government. Section 14 empowers the Excise Commissioner to (a) establish a distillery in which spirit may be manufactured under a licence granted under Section 13 on such conditions as the State Government may impose; (b) discontinue any such distillery; (c) licence, on such conditions as the State Government may impose, the construction and working of a distillery or brewery; (d) establish or licence a warehouse, wherein any intoxicant may be deposited and kept without payment of duty, but subject to payment of such fee as the State Government may direct; and (e) discontinue any such warehouse.

[19] Sub-section (1) of Section 28 envisages that every permit or pass issued or licence granted under this Act shall be issued or granted on payment of such fees, for such period, subject to such restrictions and conditions and shall be in such form and contain such particulars as may be prescribed.

[20] That Rule 14 of Madhya Pradesh Beer and Wine Rules stipulates that the licensee shall pay bottling fee, in addition to another fee and duty at such rate as may be prescribed by the State Government.

[21] Pertinent it is to note that the State Government in exercise of its powers under Section 28 (1) of 1915 Act and Rule 14 of Madhya Pradesh Beer and Wine Rules has issued notification No. F-B-1-49-2011-2V(07) dated 29/03/2011 published in the Madhya Pradesh Gazette (Extraordinary) in partial supersession notification under challenge; whereby, it prescribed bottling fee at the rate of Rs. 10 per bulk on Beer manufactured for consumption in the State by manufacturers of National status under franchise system or any other system w.e.f. 01/04/2011. This subsequent notification is not questioned by the petitioner.

[22] The issue as to whether it is within the competence of the State Government to provide for two different rates for bottling came up for consideration before the Division Bench of this Court in *Som Distilleries of Breweries Pvt. Ltd. Vs. State of Madhya Pradesh and another* [1997(2) MPLJ 376], wherein taking into consideration the contentions put forth on behalf of the State that as per the provisions of the Foreign Liquor Rules, the distillers situated out of the State who have got well established brands and marketing network in the State of M.P. were importing Indian Made Foreign Liquor and they were required to pay import fee as per the rates laid down. By way of import fee, the distillers were required to pay Rs.15/- per proof litre, where the exfactory price is more than Rs. 151/- per case of 12 quart bottles which comes to Rs. 101.25 per case (box containing 12 bottles) for past few years. The manufacturers situated outside the State started giving their franchise to the manufacturing units situated in Madhya Pradesh and started getting the bottling done within the State. Under this franchise system the liquor of the same distiller under the same brand after getting bottling done in the State is sold within the State and exported as well. Originally, these distillers were importing Indian Made Foreign Liquor in the State of M.P. after paying the import fee. Under this arrangement, the blending material was import from outside the State. This so called concentrate substance or blending material alleged to be imported from outside the State is not liable to be levied import fee, as it is not excisable article under the Act. The very object of low rates of bottling fee is being defeated by the adoption of this new self created franchise agreement.

Therefore this necessitated the amendment to check the evasion of import fee by prescribing the special bottling licence and payment of differential bottling fee of licence holder having franchise agreement and to safeguard the interest of the State exchequer. By this policy the interest of the local liquor manufacturers and bottling units was also safeguarded, it was held:-

"9. In light of above, we have to examine the arguments raised by the learned counsel for the petitioner. So far as the question regarding Article 301 of the Constitution of India and section 27-A(3) is concerned, there is no gainsaying that the Constitution and sub-section (3) of section 27-A of the Act of 1915 contemplate free flow of the trade and no discrimination should be practised. But the question is whether the notification Annexure-B has discriminated the persons similarly situated or not. In fact, the object of the State Government was to check the device adopted by the liquor contractors by taking advantage or franchise arrangement between the distillers and obtaining certain blending material and then after bottling the same, the liquor is sold out in the State or is exported outside the State. If distillers bring the manufactured liquor, then they will have to pay import duty, but by this device, they stand to gain and save import duty under the garb of bottling. By this, the State was put to a great loss of excise revenue. In order to check evasion of this excise revenue, a class which has obtained franchise and blending material for bottling has been separately classified as against the other class which is locally bottling the liquor. There are

two different classes. Since the classification is based on a rationale principle and the object sought to be achieved is the check of loss of revenue, this class of manufacturers which bottle the liquor under the franchise arrangement after obtaining the blending material is a class apart and they cannot be treated to be similarly situated as local class of persons which manufacture and bottle liquor here. There is distinction in these two classes and that distinction is a reasonable classification and makes a class, which bottles the liquor under franchise arrangement by obtaining blending material, easily distinguishable from the class which manufactures the liquor of its own without any franchise arrangement or without obtaining blending material from outside the State. Therefore, State by this amendment has checked the loss of revenue. This kind of classification neither prohibits nor violates the provisions of Article 301 of the Constitution of India nor section 27-A(3) of the Act of 1915.

10. It is also relevant to mention that sub-section (3) of section 27-A of the Act of 1915 says that two classes of persons who are similarly situated should not be discriminated in matter of imposing duty. It is true that such discrimination cannot be permitted but if these two classes of persons stand on different footing, then there is no question of discrimination. Here there are two classes of persons, one who bottles the imported liquor and another who has franchise from a manufacturer and brings blending material from outside and then bottle them in the State. As such, these classes are distinguishable and thus there is no violation of section 27-A of the Act of 1915.

11. There is another aspect of the matter also that section 27-A talks of duty and not the fee. It is a fee which the State is charging and not duty. Entry 8 of List-II of VIIth Schedule lays down that the State is competent to legislate on intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. In fact, the bottling is a part of manufacturing process. No liquor can be supplied without bottling. 'Bottle' has already been defined Under Section 2(2) of the Act of 1915. The State is competent to legislate in respect of rate of fees and how the bottling is to be done as the bottling is the part of manufacturing process. Entry 66 of List-II says that a fee can be levied by the State. Therefore, the State Government is competent to legislate and impose fee under Entry 8 read with Entry 66 of List-II of VIIth Schedule. It is therefore wrong to contend that the State does not have authority to impose fee. It may also be relevant to mention here that Entry 51 deals with the excise duty and countervailing duty. Bottling fee which is charged is not an excise duty, though it is an excise revenue for the State. It is the fee which is being charged and it is within the competence of the State under Entry 66 of List-II and Entry 8 of List-II of VIIth Schedule of the Constitution. In this connection, reference of section 27-A has no relevance as it talks about the excise duty and not the fee."

[23] What is true about bottling price under Foreign Liquor Rules is equally true of bottling under Beer and Wine Rules. Since the validity of similar rule under

Foreign Liquor Rules, whereby different bottling rate has been upheld, we see no good ground to take a different view.

[24] Consequently, challenge to the validity of Notification No. (60) B1-99-07-2.V dated 28/03/2008 fails and rejected.

[25] In the result, petition stands dismissed. No costs.