
(1992) 07 BOM CK 0005

In the Bombay High Court

Case No : Writ Petition No's. 3084 of 1989 and 2607 and 2542 of 1990

Ramon Distilleries Ltd. and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 21-07-1992

Acts Referred:

Bombay Prohibition Act, 1949 — Section 105, 106, 11, 143, 143(1)

Maharashtra Foreign Liquor (Import and Export) Rules, 1963 — Rule 21, 22, 23, 24, 25

Citation : (1993) 1 BomCR 18 : (1992) 94 BOMLR 498

Hon'ble Judges : H.D. Patel, J

Bench : Single Bench

Advocate : V.R. Manohar, A.G. and M.G. Bhangde, for the Appellant; D.N. Kukday, A.G.P. and S.A. Bobde, for the Respondent

Final Decision : Allowed

Judgement

H.D. Patel, J.—Since common questions of fact and law arise in all the three petitions, they are being disposed of by this judgment.

2. In Writ Petition No. 3084 of 1989 the petitioners have prayed for quashing the order dated 29th August, 1989/20th September, 1989, passed by the Collector, Nagpur whereunder a sum of Rs. 1,17,14,025.00 on account of excise duty and transport fees was demanded for committing alleged breach of Rule 25(3)(4) and (6a) of the Maharashtra Foreign Liquor (Import and Export) Rules (hereinafter referred to as "the Rules"). Similarly, the petitioners have also challenged the order dated 16th October, 1989 also passed by Collector, Nagpur demanding the sum of Rs. 64,55,426.60 on account of Excise Duty and Transportation Fees for alleged breach of the rules referred to above. It is alleged in those notices that in enquiry held by the Special Enquiry Officer, it transpired that on the basis of Import permit submitted by the petitioners, export passes were obtained and Indian Made Foreign Liquor (for short "IMFL") was exported on PLL licence. It is alleged that the import permits, the list of which is given in Appendix annexed produced by the petitioners and their agents for obtaining Export Passes are false

and fake and not issued by the Officer of Collector, Hoshangabad (Madhya Pradesh), so also the acknowledgements of the Certificates in Form Certificate-3, regarding delivery of IMFL after obtaining false and forged signatures. It is further alleged that the goods were exported on the basis of false import permits and thereby violated the condition of Form "H" Bond submitted for exporting IMFL.

3. In Writ Petition No. 2607 of 1990 the petitioner has prayed for quashing and setting aside orders dated 16-5-1989, 16-2-1990, 23-4-1990 and 27-7-1990. Under order dated 16-5-1989 the sum demanded was Rs. 8,17,425/- on account of Excise Duty and Transport fee for alleged breach of Rule 25(3) and (6) of the rules. Similarly, under order dated 16-2-1990 and 23-4-1990 the demand was for Rs. 13,85,579.00 and Rs. 6,76,774.00 respectively. The figure Rs. 6,76,774/- was, however, corrected to Rs. 4,50,774/- by order dated 27-7-1990. Identical allegations are made even in these orders that IMFL was exported under the forged import permits to different class of importers.

4. In Writ Petition No. 2542 of 1990 the petitioners prayed for quashing and setting aside the order dated 23-4-1990 whereunder the demand made was for Rs. 2,26,098/- for alleged breach of Rule 25(3),(4) and (6a) of the Rules.

5. In order to appreciate the challenge, some facts as they emerge from the records would be relevant. The petitioner No. 1 and respondent No. 3 entered into an agreement dated 10-1-1985, under which the petitioner No. 1 agreed to manufacture IMFL at its distillery in Nagpur and supply the same to respondent No. 3. On going through the agreement, it is clear that IMFL was to be prepared by respondent No. 3 at the distillery of petitioner No. 1, the main process of manufacture being carried out by their representatives posted at the distillery out of raw materials including spirit supplied by them. The bottling, labelling, sealing and packing was to be done by the respondent No. 3. The transportation of the packed IMFL products was to be done at the cost of respondent No. 3, whenever and wherever it was instructed by respondent No. 3.

6. The said agreement was sent to Commissioner of Prohibition and Excise followed by request from the petitioner No. 1 to approve the Bromides of the labels. The request was granted subject to certain conditions. One of them was regarding the words to be used on labels. The labels should specify in clear words "Blended and Bottled by.....(name and address of Distillery) for Tilaknagar Distillery and Industries Limited." This clearly indicates that IMFL manufactured at the Distillery of petitioner No. 1 was for and on behalf of the respondent No. 3.

7. The first and foremost contention raised on behalf of the petitioners was denial of any opportunity to defend themselves in an enquiry said to have been instituted under orders from higher Authorities. The admitted position is that no show-cause notice was served upon the petitioners. Therefore, question of filing of reply explaining the charges does not arise. It is also an admitted position that orders demanding amounts were served without even hearing the petitioners. It

appears that respondent No. 2, collected some material which, as I shall shortly point out, was vague, imaginary and having no basis whatsoever. It may be relevant to observe here that the materials on which conclusions are based are neither filed on record nor shown or pointed out during the course of hearing. It seems that no enquiry worth its name appears to have been held before the orders impugned were passed and served on the petitioners. This will be clear from specific instances that will be discussed hereinafter.

8. M/s. Kohinoor Traders, Gwalior was one of the importers as per order dated 29th August, 1989/20th September, 1989 impugned in Writ Petition No. 3084/89. It is observed by respondent No. 2 that the goods covered by export pass No. FLR 1185/F-14/85-86 dated 23rd September, 1985 have not been received by the importers at Gwalior and the petitioners have not yet submitted the acknowledgement of the delivery of goods in Form-R-3. The petitioners have filed papers Annexure-16 which will show that the goods were escorted by a constable of Prohibition and Excise Shri P.P. Kawale-Buckle No. 43 and the goods were delivered to M/s. Kohinoor Traders, Gwalior on 27-9-1985. The acknowledgements are also filed on record.

9. In the very same notice, it is alleged that except M/s. Kohinoor Traders, Gwalior the other importers, namely, T.C. Jaiswal, Itarsi, M/s. Shivare Enterprises, Itarsi and M/s Amarsingh, Seoni (Malwa) District Hoshangabad do not hold export-import or sale licence and yet the goods are shown to have been dispatched to these importers. The conclusion drawn by respondent No. 2 is without perusal of the relevant rules in force in that State. Rule XII of the C.P. Excise Rules provides for import of IMFL by a foreign liquor licensee or any other person on prepayment of duty in Madhya Pradesh, subject however to certain conditions. It is thus clear that IMFL can be imported on pre-payment of duty in the State of Madhya Pradesh either by foreign liquor licensee or by any other person, subject to the conditions stated in that rule. The petitioners have even filed an import permit (Exh. 15) showing prepayment of duty by the importer Shri T.C. Jaiswal, Itarsi amounting to Rs. 89,302.50.

10. It will also be relevant at this juncture to look into the transactions referred to in four orders impugned in Writ Petition No. 2607/90. The transactions are either against "C" Form or on the basis of recovery of the Central Sales Tax at the rate of 10% from the purchaser. A copy of the "C" Form is annexed with the petition. The respondent No. 2 in his additional written submissions stated that "C" Form is blank and hence, the same cannot be relied upon. It is difficult to accept the statement of respondent No. 2 that the "C" Form is totally blank. In any event, the fact remains that Central Sales Tax is required to be paid in case of interstate sale. If enquiry was made before drawing the conclusion, the Special Officer must have seen even records relating to payment of Central Sales Tax. If not, the nature of enquiry held can well be imagined.

11. From the aforesaid instances, one thing is clear that the enquiry held was not only vague but it was against all norms of the principles of natural justice. The

respondents have failed to abide by their own Circular No. ABD-1003/IV dated 18th March, 1983 issued by Commissioner of Prohibition and Excise on the subject of procedure to be followed before issue of demand notices to any licensee for the payment of excise dues. The said Circular stipulates issuance of show-cause notice, the contents or particulars which should be incorporated therein, stipulating time for giving explanation and further procedure to be followed, depending upon the circumstances. In complete derogation of the said circular huge demands for excise duty came to be made one after the other. Such orders as are impugned in these petitions are not liable to be sustained being void, illegal and nonest.

12. The three petitions could be disposed of on the basis of finding given above but I refrain from doing so, since other points were also heard at length and in particular the challenge to the proviso of sub-rule (1) of Rule 23 of the rules as ultra vires the Act and beyond the rule making power of the State. I, therefore, proceed to decide other points also involved.

13. It was urged on behalf of the petitioners that a combined reading of the provisions of the Bombay Prohibition Act and the various rules framed thereunder would make it clear that if IMFL which is exported from the State of Maharashtra is delivered at the importing place, no excise duty is leviable in the State of Maharashtra. Hence, no recovery could be made by sending the impugned orders to the petitioners. In order to decide this point, it is necessary to go through the relevant provisions of the Act and the Rules.

14. Chapter VIII of the Bombay Prohibition Act, 1949 provides for levy and collection of Excise Duties. Section 105 enables the State Government to levy excise duty on alcoholic liquor for human consumption when imported, exported, transported, possessed, manufactured or sold in or from the State, as the case may be and section 106 provides for the manner of levying Excise duties. It provides that subject to any regulations to regulate the time, place and manner of payment made by the Commissioner in this behalf, the duties referred to in section 105 may be levied in one or more of the manners stated therein. No regulations have been framed or atleast brought to the knowledge of this Court by the Authorities concerned regulating the time, place and the manner for payment of Excise Duty. Clause (b) of section 106 provides that the duty referred to in section 105 may be levied in the case of Excisable article exported by payment in the State at the time of export or in the State of import. Each State has framed rules governing export/import, transport, etc., of the excisable articles.

15. In so far as the State of Maharashtra is concerned, it has framed "the Rules" called the Maharashtra Foreign Liquor (Import and Export) Rules in exercise of the powers conferred by Clause (b) of sub-section (2) of section 143. Chapter IV thereof lays down the procedure for export of IMFL. Rule 21 lays down that a licensee who desires to export any IMFL to any other part of India shall first obtain a permit from Excise Officer at the importing place authorising him to

export such liquor to that place. Rule 22 provides that on receipt of such permit, the exporter shall apply for an export pass along with the permit. Rule 23 provides for issue of export pass. Before issuance of an Export pass, an enquiry is contemplated therein. It also provides for the exporter to execute a "bond" in form-H for payment of duty and fees leviable on the IMFL to be exported. The export pass is divided into four parts. Part I is retained by the issuing office, Part II is sent by post to the Excise Officer at the importing place, Part III is forwarded to the Prohibition & Excise Officer in charge of the distillery from which foreign liquor is to be exported and the Part IV is handed over to the Exporter. Rule 24 provides for issue of IMFL for the purposes of export. It provides for handing over Part IV of the Export Pass of the Officer in charge of the distillery from which the liquor is exported. The officer is enjoined with the duty to compare Part IV with Part III and the import permit and only after he finds no objection to issue foreign liquor from the distillery, he shall hand over Part IV to the exporter and forward Part III to the Prohibition and Excise Officer who is to inspect the consignment under Rule 25. The said rule provides for inspection of the consignment enroute. The inspecting Officer if he sees no objection and upon due verification allow the consignment to be dispatched. He has to compare Part IV of the export pass with Part III sent to him direct under Rule 24. The Part IV of the pass is to be returned back to the exporter; whereas Part III is to be forwarded by post to the Excise Officer at the importing place with a request to endorse thereon the quantity of IMFL in bulk litres received at the importing place and return the same to the Officer-in-charge of the distillery from which the foreign liquor was exported. On delivery of IMFL at the destination, the exporter is required to obtain a certificate in form "C" annexed to Part IV of the pass from the Excise Officer at the place of import and deliver to the Officer-in-charge of the distillery from which the liquor was exported. On receipt of Part III or the certificate "C", the Officer-in-charge of distillery shall calculate the excise duty and fees, if not paid earlier, at the rate in force at the place of export on the quantity of IMFL - not delivered at the importing place and then send a report to the Collector, informing the amount, if any, to be recovered from the exporter together with Part III and the certificate after keeping copies thereof for his record. The Collector then verifies the calculation demands from the exporter the amount due and on recovery cancels the bond. Sub-rule (6) of Rule 25 makes the exporter liable for payment of duty and fees in case the consignment of IMFL is not delivered at the place of import. By going through these rules, it is abundantly clear that Excise Duty is not payable in the State of Maharashtra but it payable at the place of import which in the cases at hand would be the State of Madhya Pradesh. The liability of the exporter to pay duty in the State of Maharashtra would only arise in case the consignment of IMFL is not delivered at the place of import or for breach of any of the rules in this Chapter.

16. The petitioner No. 1 received the import permits either directly or through respondent No. 3. Based on these permits, export passes were applied for. The Excise Authorities after making due enquiries issued export passes. The

procedure enjoins the duty on Excise Officials to conduct necessary enquiries both before the issuance of import passes as well as during transport of IMFL products whilst in transit. A glance at the conditions printed below the export pass (Form-1) would show that the route through which the IMFL products will pass is settled in advance and that route is not liable to be changed. It facilitates inspection when the goods are en route. With such inbuilt rules, it is not possible that the IMFL products will not reach the place of destination, particularly when acknowledgement in form of Certificate-C is also received and submitted to the Excise Office.

17. At this juncture, it is also necessary to glance through some salient features of the C.P. Excise Rules. Rule XII thereof is already referred to above. Sub-rules (ii) and (iii) of Rule XII provide for obtaining an import pass which is also in four parts. The part I is to be retained by Collector, the Parts II and III are sent by post of Chief Excise Authority of the District of Export and Part IV is handed over to the importer or applicant. Sub-rule (iii) is most relevant. The importer shall present Part IV of the import pass to the Chief Excise Authority of the District of export, who if he seems no objection after comparing it with Part II and Part III of the pass received by him direct from the issuing authority, shall issue orders for delivery of liquor in accordance with the rules in force in his district. The Part IV is returned to the importer and the Parts II and III received by him are sent to the Excise Officer in charge of the distillery from which liquor is to be removed. Part IV is then returned to the importer and which part will accompany the consignment. Part III forwarded to the officer who issued the import pass and retain Part II for his records. It is clear from these rules that the respondent No. 2 had ample chance to verify, tally and even crosscheck the validity and genuineness of the import pass received from the State of Madhya Pradesh. Rule XV of the C.P. Excise Rules provides for the procedure where import is done on prepayment of duty in the District or place of export.

18. A bare perusal of the orders impugned will bear out the fact that the IMFL products have been exported from the State of Maharashtra to their respective destinations in the State of Madhya Pradesh. There is enough material on record to show that the goods have been consigned to the importers through agencies and payments therefore have been received by respondent No. 3 being the owner and seller of the goods. The only grievance made out in the impugned orders was that the consignments of IMFL were exported on false and fake permits. Except for a mere statement and that too generally made for all consignments nothing concrete is shown to describe the permits as forged ones. On being asked to substantiate the allegations that the permits were false and fake, no evidence, said to have been collected during the enquiry was put forth on behalf of respondent No. 2. As stated above, the Excise Authorities had occasions to deal with import permits at various stages at the time of export. At no point of time these Authorities could detect that these import permits were forged ones even though enquires are stipulated at various stages. The checks and re-checks are inbuilt in the rules. Even if the said import permits or some of

them were as stated by respondent No. 2 to be false and fake, it was not possible for the petitioner No. 1 or even respondent No. 3 to detect that they were not genuine unless direct charge or connivance in creation of false and fake permits is made and established against both or any of them. There being enough material to conclude that the consignments have reached its destination in the State of Madhya Pradesh the grievance for non-collection of the duty and fees could be of that State and the State of Maharashtra is not concerned with it. The demand made for excise duty and fees under the impugned orders is wholly misconceived and not tenable. The orders impugned deserve to be quashed also on this count.

19. The next question that falls for determination is whether proviso to sub-section (1) of section 23 of the Maharashtra Foreign Liquor (Import & Export) Rules, 1963 is ultra vires of the provisions of the Act and the powers of the State Government to make rules and hence liable to be struck down. Before embarking upon this point, it is necessary first to decide who is an Exporter-whether the petitioner No. 1 or respondent No. 3. In this context, it will be worthwhile to go through some of the terms and conditions of the agreement. Under Clause 3, a technical representative of respondent No. 3 was required to be posted for checking and supervision the reduction of spirit to its required strength and for testing and recording the quality of spirit. Clause 8 of the agreement also provided for blending to be done by the representative of respondent No. 3. Clause 11 thereof showed that the respondent No. 3 was to obtain at its costs such permits as may be necessary for the purpose of despatches from petitioner No. 1 to respondent No. 3 or elsewhere upon his instructions. The supply of bottles, labels, filtered powder, seals, capsules, corrugated boxes, wooden cases, wire matting, etc., required for packing IMFL products was the responsibility of respondent No. 3 under Clause 13 of the agreement. The petitioners had agreed to submit the statement of stocks of such material received, utilised in the manufacturing process and the stocks at hand every month under Clause 15 of the agreement. In terms of Clause 18 of the agreement, the brand names and the get up in which the IMFL products are supplied by the petitioner No. 1 to respondent No. 3 and sold by them would be the property of respondent No. 3 and the petitioners are barred from claiming any right in them. Under Clause 21 and 22, the respondent No. 3 had undertaken the liability to pay excise duty. The petitioner No. 1 was only entitled to get Rs. 16/- per case as service charges. Under Clause 24, the deliveries of IMFL products are ex-distillery but the petitioner No. 1, if so required by respondent No. 3, may load and despatch by rail all IMFL products to such destinations as respondent No. 3 may indicate from time to time. The cost of loading and despatching expenses including freight, insurance, octroi duties, excise duties, escort charges and such other expenses after the goods leave the manufactory was to be borne and paid by respondent No. 3. Under Clause 29, the respondent No. 3 has undertaken to obtain verification where necessary under the excise rules at different points at which despatches are made and to

return certificates to petitioner No. 1 within the prescribed period. In case of any delay in returning such certificates the petitioner No. 1 was to obtain extension of time on request of respondent No. 3, the cost for which is agreed to be paid by them.

20. Upon going through the agreement, it is clear that respondent No. 3 wanted to manufacture IMFL at the distillery of petitioner No. 1. It is also clear that obtaining the strength of spirit and blending was to be done by representative of respondent No. 3 at the distillery of petitioner No. 1. The petitioner No. 1 was required to submit the statement of stock of material received, utilised and the stock at hand every month. It was the responsibility of respondent No. 3 to obtain permit necessary for the purpose of export of IMFL. The IMFL was to be the property of respondent No. 3 who alone could sell it. The petitioner No. 1 was under the obligation to follow instructions of respondent No. 3 on all aspects of the matter. The deliveries of IMFL products were to be ex-distillery, but if so required by the respondent No. 3 the said product was required to be despatched to such destination as may be indicated by the respondent No. 3. The respondent No. 3 was to bear the cost of loading, despatching expenses and arrangement of transport. The excise charges, if any, were the responsibility of respondent No. 3. It was the responsibility of respondent No. 3. to obtain certificates on the delivery of products at the place of import. Whatever the petitioner No. 1 was required to do under the agreement was for and on behalf of respondent No. 3. For all purposes, the petitioner No. 1 was the agent of respondent No. 3 and it was respondent No. 3 alone who was the manufacturer, exporter, owner and seller of the goods in question. The fact that the petitioner No. 1 was the agent of respondent No. 3 has been admitted by them in the return. In paragraph No. 5, it is mentioned "I say that whenever an intending purchaser outside Maharashtra wishes to purchase IMFL to be supplied either from respondent No. 3's factory or from any of the bottling agents, he has to obtain an import permit from the excise authorities in the State, i.e., the purchaser's State." Again in paragraph 6, it is stated "If the supply is to be made through a bottling agent (such as petitioner No. 1 herein), then the import permit is made out in the name of that distillery". Thus, there remains no iota of doubt that the petitioner No. 1 is admittedly the agent of respondent No. 3. As stated above, the agreement in question was brought to the notice of the Excise Authorities and approval for bromides of the labels for affixing on the bottles was granted. The wordings on the label "Blended and Bottled by (name and address of distillery) for Tilaknagar Distilleries Ltd.," was directed to be used. The Excise Department had thus full knowledge of the fact that the petitioner No. 1 was the agent of respondent No. 3.

21. In the context of what has been discussed above, it would be proper to quote some portion of the letter dated 2-12-1985 (Annexure 5 in Writ Petition No. 3084/89) which makes the position crystally clear. That portion is as under : "Clause 22 of the said Agreement provides that the service charges of Rs. 16/- is exclusive of Sales-tax, Excise duty, Vend fee, Export fee, Octroi, Insurance,

excise escort charges and other charges or duty as may be applicable from time to time. At our instance, you have obtained a permission to despatch the IMFL consignments without escort. Since the agreement is essentially an agreement for bottling for a fixed service charges and the escort charges, etc., are otherwise also payable by us, we hereby undertake that any loss caused to you due to the Excise escort not accompanying the consignments shall be entirely ours. We undertake to indemnify you for any losses suffered by you on account of duty, penalty, etc., imposed by the Excise Dept., in respect of the consignments of IMFL despatched without Excise escort by you through us pursuant to the agreement dated 10th January, 1985 above referred." From the aforesaid contents of the letter, it is abundantly clear that the entitlement of petitioner No. 1 was only Rs. 16/- per case and that it was at the instance of respondent No. 3 that the petitioner obtained permission to despatch IMFL consignments. Obviously, the petitioner No. 1 was the constituted agent of respondent No. 3.

22. Then there is ample material on record that the import permits were procured by respondent No. 3 who sent the same to the petitioner No. 1 and requested them to procure export pass and then despatch the IMFL products accordingly. The petitioner No. 1 under instructions applied to respondent No. 2 for grant of export pass for exporting of IMFL on the basis of import permit sent to them by respondent No. 3. The petitioners also executed bond in Form-H which is a condition precedent for grant of export pass. The transport of the goods was also arranged by the Nagpur office of respondent No. 3. In the lorry receipts, the consignor is respondent No. 3. The IMFL was sold by respondent No. 3 to the concerned importer who paid the price of the consignment directly to respondent No. 3. Viewed even from this angle, the conclusion drawn above is fortified.

23. The respondent No. 3 has not disputed the factual aspects of the matter. They, however, contend that petitioner No. 1 will be the exporter for purposes of Rule 22 of the Rules. The Act and the Rules contemplate only one exporter and hence it will be difficult to accept this contention for the reasons which follow hereinafter. Even the respondent No 2 has adopted the same line of reasoning in their Return.

24. Coming to the legal aspect of the matter, the relevant provisions to be considered are sections 80,105 and 106 of the Bombay Prohibition Act and the Rules 21, 22 and 23 of foreign Liquor (Export and Import) Rules. Except section 80, other provisions are already discussed above in detail. To summarise briefly, section 105 enables the State Government to levy excise duty on alcoholic liquor for human consumption when imported, exported, transported, possessed, manufactured or sold in or from the State as the case may be. Clause (b) of section 106 provides that the duty referred in section 105 may be levied in the case of excisable article exported by payment in the State at the time of export or in the State of import. A combined reading of the two sections clearly reveals that the State Government is entitled to levy excise duty on alcoholic liquor

meant for human consumption in the case of export of the said article either by payment in the State at the time of its export or in the State or territory of export. The incidence of duty is upon the exporter. Section 80 of the Bombay Prohibition Act which falls under Chapter VII and which deals with offences and penalties would be relevant. It reads as under :

"Section 80(1) Whenever any intoxicant, hemp, mhowra flowers or molasses are manufactured, imported, exported, transported, sold, or are possessed by any person on account of any other person and such other person knows or has reason to believe that such manufacture, import, export, transport, sale or possession is, on his account, the intoxicant, hemp, mhowra flowers or molasses, as the case may be, shall, for the purposes of this Act, be deemed to have been manufactured, imported, exported, transported or sold by or to be in possession, of such other person.

(2) Nothing in sub-section (1) shall absolve any person from liability to any punishment under this Act for the unlawful manufacture, import, export, transport, sale or possession of such articles."

Analysing the aforesaid sub-section (1) which is relevant for the purpose, it is clear that when an intoxicant is exported by any person on account of any other person and such other person knows that such export is on his account, the intoxicant for the purposes of the Act, be deemed to have been exported by such other person. Sub-section (2), however, makes the person who actually exports the excisable article liable for punishment, if so otherwise provided under the Act.

25. It will be appropriate at this stage to refer to decision of Supreme Court in Commissioner of Sales Tax v. Dr. Sukh Deo, 25 S.T.C. 385. In that case the revenue authorities had held that if medicines and pharmaceutical preparations as prescribed by the doctor were mixed, the process of mixing resulted in manufacture of medicines as a "manufacturer". It was observed that the expression "manufacture" has in ordinary acceptation a wide connotation. It means making of article, or material commercially from basic components, by physical labour or mechanical process and the "manufacturer" is the person by whom and whose direction and control the articles or materials are made. It will also be appropriate to refer to the case of Commissioner of Income Tax v. Neo Pharma Private Limited, 1982 Tax 66 . The question which arose in that case was that whether the manufacturing activity was really that of the assessee, although the Plant and Machinery employed for the purpose of manufacture belonged to the Pharmed and the services certain employees of Pharmed were utilised in the process. The Court observed that it was the assessee which paid hire charges for the machinery and plant. It was the assessee which purchased the raw materials and the packing materials. The employees of Pharmed carried out the manufacture of drugs and pharmaceuticals under the direct technical supervision of the expert staff employed by the assessee and the products manufactured were of the quality prescribed by the assessee. The risk of entire operation was that of the assessee. In view of this, it was held that the drugs and

pharmaceutical were not manufactured by Pharmed but by the assessee.

26. The present is the case of export of IMFL from the State of Maharashtra to other State such as Madhya Pradesh. The exporter will be respondent No. 3 alone and none else.

27. The Rules 21,22 and 23 have been discussed in detail above. These rules show that if any person who holds necessary licence is desirous of taking out IMFL products to any other part of India, he has to first obtain a permit from the Excise Officer at the importing place. The permit which is issued is called the import permit. The import permits in the cases at hand were procured by respondent No. 3. On the basis of these permits, export pass for taking out the IMFL from the State of Maharashtra could be made. The application for grant of export pass was made by petitioner No. 1 at the instance and under the directions of respondent No. 3. The applications made were for and on behalf of respondent No. 3. The export pass is granted by the Collector under Rule 23 which reads as under :

"23. Issue of export pass :

(1) On receipt of the application under Rule 22, the Collector or the officer issuing the pass shall make such inquiries as he may deem necessary; and if all duties and fees leviable under the Act, have been paid in respect of the Indian-made Foreign Liquor to be exported or if the exporter has deposited with him a sum which in his opinion is sufficient to cover the amount of duty and fees or if the applicant has executed a bond in Form H with two sureties for the payment of the duty and fees leviable on the quantity of Indian-made Foreign Liquor to be exported. He shall grant him the export pass in Form I on recovery of export fee at the following rates :

(a) Indian-made Foreign Liquor except spirits, wines, Fifty five malt liquor, ale, beer, porter, cider and other Paise fermented liquors; per litre.

(b) Spirits, Wines, malt liquor, ale, beer, proter, cider and Rs. 0.38 other fermented liquors. per litre.

Provided that, if the applicant is not a resident of the place of export, his agent at such place who is approved by the Collector or the officer issuing the pass may act for him, and in such case, both the applicant and his agent shall be jointly and severally liable under the bond for the amount of duty and fees which may ultimately fall due."

Enquiry is contemplated before the export pass is granted and the three conditions laid down are satisfied. They are :

(i) If all duties and fees leviable under the Act have been paid in respect of IMFL to be exported,

(ii) If the exporter has deposited with the Collector, as sum which in his opinion is sufficient to cover the amount of duty and fees,

(iii) If the applicant has executed the bond in Form H with two sureties for payment of duty and fees leviable on the quantity of IMFL to be exported.

It is not in dispute that petitioner No. 1 has executed the bond in Form-H and was granted export pass to export IMFL. Since the petitioner No. 1 was doing everything at the honest of respondent No. 3, the execution of the bond was also for and on behalf of the respondent No. 3. The person who obtains the import pass is the exporter according to Rule 21. It is the exporter alone who could apply for export pass as per Rule 22. However, proviso to Rule 23 envisages a position where exporter may not be a resident of the place of export, in that event, the agent is authorised to act on his behalf. The import permits were procured by the respondent No. 3 who in turn instructed the petitioner No. 1 to apply for export pass. The petitioner acted according to the instructions and obtained the export pass upon execution of the bond in Form-H. Obviously, the petitioner No. 1 acted as an agent of respondent No. 3 and not in any other capacity as sought to be urged on behalf of the respondents.

28. The proviso to Rule 23 of the rules makes the agent of the exporter liable, may be vicariously along with the exporter to pay excise duty and the fees which may ultimately be found due. The validity of the proviso is challenged in these proceedings on behalf of the petitioners. According to them, the Rules are nothing but a delegated piece of legislation and the State Government must frame Rules within the powers delegation to them. In other words, the State Government has to act within the bounds of the parent Act. It was also submitted that making the agent liable along with the exporter is an excise of power which the rule-making authority did not possess. In this connection, reliance was heavily placed on the decision of Supreme Court in the case of Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., . Paragraph 18 states the law on the subject and is hence extracted below :

"No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it."

The aforesaid decision is reiterated by Supreme Court in a recent decision in the case of Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawalla & others, 1992 S.V.L.R. 304. The law on the point is stated thus :

"After giving out anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that the delegated authority must act strictly within the

parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental and ancillary power in the matter of exercise of fiscal power....."

The preamble of the Rules shows that the Rules are framed in exercise of powers conferred by Clause (b) of sub-section (2) if section 143 read with sections 11, 26(d) and 53 of the Bombay Prohibition Act. Section 11 comes under Chapter III which lays down the various prohibitions. That section deals with manufacture, etc., of intoxicants to be permitted in accordance with the provisions of the Act, Rules, etc. The section does not confer any power upon State Government to provide for levy of excise duty or fees by framing any Rule, upon an agent of the exporter. Section 26(d) enables the State Government to establish or license a warehouse, wherein the intoxicant or any other excisable article can be deposited and kept without payment of duty. Even this provision does not empower the State Government to frame a rule making the agent of the exporter liable to pay excise duty and fees. Section 53 provides for general conditions of granting licences, etc., and is irrelevant for the controversy at hand. What remains is section 143(2)(b) which reads thus :

"Section 143(1) The State Government may make rules for the purpose of carrying out the provisions of this Act or any other law for the time being in force relating to excise revenues.

(2) In particular and without prejudice to the generality of the foregoing provisions, the State Government may make rules ---

(a) regulating and delegation of any powers by the Commissioner, by Collector or by any other Prohibition Officer;

(b) regulating the import, export, transport, collection, sale, purchase, bottling, consumption, use or possession of any intoxicant, denatured spirituous preparation or hemp, mhowra flowers or molasses;....."

Under this provision, the State Government is empowered to make rules regulating the various activities in respect of excisable articles as detailed in the aforesaid Clause. To regulate would mean "to control" or "direct by rules or regulations", "to subject to guidance or restrictions". The expression "regulate" cannot mean conferral of power to impose tax or a fee. It contemplates procedures to be followed in different matters like import or export of IMFL products and so on. The levy of excise duty and fees on the agent of the exporter can, in no circumstance, be included within the meaning of expression "regulating" used in the section, as contended on behalf of the respondents.

29. The aforesaid provisions only enable the State Government to regulate the import, export, transport, collection, sale, purchase, bottling, consumption, use or possession of any intoxicant, etc. The State Government can only frame rules which would regulate the aforesaid activities. There is no provisions in the Act which makes a person who acts as fan agent for owner of the goods liable to pay

excise duty leviable u/s 105 of the Bombay Prohibition Act. Similarly, there is no provision in the Act which enables the State Government to frame a rule making agent jointly and severally liable with the owner of the goods. In the absence of such a provision in the substantive Act, it was not open to the State Government to frame a rule making the agent liable jointly and severally with the owner of the goods. Although the rules could be framed to regulated activities in Clause (b) of sub-section (2) of section 143 of the Act it will not include within its compass fastening of vicarious liability statutory upon the agent in absence of a provision to that effect under the main Act. It is thus clear that the powers to sub-rule (1) of Rule 23 is ultra vires of the provisions of the Act and the power of the State Government to make rules and hence the said proviso is invalid and unenforceable.

30. For the aforesaid reasons, the three writ petitions are allowed. The impugned orders in these petitions are quashed and set aside. It is further declared that proviso to sub-rule (1) of Rule 23 of the Maharashtra Foreign Liquor (Import & Export) Rules, 1963 making agent liable to pay excise duty along with the exporter is ultra vires the Bombay Prohibition Act and beyond the rule making power of the State. Rule is accordingly made absolute. The parties in each of the petitions shall bear their respective costs.