

(2015) 09 PAT CK 0069

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 21965 of 2014

Spicy Beverage Pvt. Ltd.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 42, 42(1)(a), 42(1)(h), 42(1)(h)(i), 42(h)(i)
Constitution of India, 1950 — Article 226

Citation : (2015) 4 PLJR 312

Hon'ble Judges : I.A. Ansari, A.C.J; Chakradhari Sharan Singh, J

Bench : Division Bench

Advocate : Y.V. Giri, Senior Advocate and Satyabir Bharti, for the Appellant; Lalit Kishore, PAAG and Bishwa Bibhuti Kumar Singh, A.C. to PAAG, Advocates for the Respondent

Final Decision : Disposed off

Judgement

I.A. Ansari, Acting C.J—The petitioner, M/s. Spicy Beverage Private Limited (hereinafter referred to as "the petitioner Company"), a private limited company, engaged in the manufacture and supply of country liquor in the State of Bihar, was granted exclusive privilege for manufacturing country liquor and supplying the same from its warehouse to Bihar State Beverage Corporation Limited in the district of Nalanda. The exclusive privilege, which was initially granted for the period 01.07.2009 to 31.03.2012, was further extended till 30.11.2012.

2. In terms of the conditions of license, the petitioner Company was required to manufacture country liquor, do packaging thereof in sachets, the sachet containing either 200 ML of country liquor or 400 ML of country liquor by adhering to the strength of 60° UP.

3. So far as quality is concerned, Rule 22(i) of Bihar Country Liquor Bottling Rules, 2004, prescribes that the country liquor should not be, in any case, weaker or stronger than 0.3 degree of the prescribed strength and in case the

prescribed strength is found to be weaker or stronger than 0.3 degree of the prescribed strength, action shall be taken under Section 42 of the Bihar Excise Act, 1915.

4. So far as the quantity of country liquor is concerned, the 1st Schedule to the Legal Metrology (Packaged Commodities) Rules, 2011, prescribes a maximum permissible error of 4.5 per cent and 3 per cent in excess or wastefulness of the declared quantity of packages of 100-200 ML and 400 ML is permitted and, thus, in a 200 ML sachet of country liquor, an error of 9 ML is permitted and, in a 400 ML sachet of country liquor, an error of 12 ML is permitted.

5. On 06.09.2012, the Secretary, Excise and Prohibition Department, Patna, conducted inspection of the warehouse-cum-sacheting plant of the petitioner Company, at Nalanda, the godown of Bihar State Beverage Corporation Limited and several other country liquor retail outlets and samples of manufactured country liquor were seized from them and sent for examination to the Excise Chemist, Bihar, who, in turn, by its letter, dated 07.09.2012, reported that while the samples of country liquor collected from the warehouse-cum-sacheting plant of the petitioner Company at Nalanda and the godown of Bihar State Beverage Corporation Limited conformed to the prescribed strength and quantity, the samples of country liquor, taken from the different retail outlets, at Nalanda, were not of prescribed strength and quantity.

6. In the light of the Chemist's report and, on the presumption that the samples of country liquor, taken from the retail outlets, were supplied by the petitioner Company, the Excise Commissioner, Bihar, Patna, on 13.09.2012, issued direction to the Collector, Nalanda, to calculate the loss of revenue incurred by the Government due to the manufacture and supply of sub-standard country liquor by the petitioner Company to the retail outlets at Nalanda. The letter, dated 13.09.2012, addressed to the Collector, Nalanda, if translated into English, reads thus:

"Sub: With Respect to irregularity upon checking of samples collected by a team constituted at the HQ level on 6.09.2012 from various retail country liquor shops in Nalanda district. Sir,

With respect to the above subject matter, it is stated that on 6.09.2012, a team constituted at HQ level obtained the samples of country liquor obtained from country liquor warehouse, Nalanda District and other country liquor shops which were examined. The Excise Chemical Analyst, Bihar, Patna by his Report dated 7.9.2012, as contained in Memo No. 1798 has issued a test Report of the samples (Copy enclosed), in which it has been reported that the strength and quantity of country liquor is less than the prescribed standard. Therefore, you are directed to obtain a show-cause from the manufactures and suppliers of country liquor, namely M/s. Spicy Beverage Pvt. Ltd. For Manufacture and supply of country liquor less than the prescribed strength and quantity as per the country liquor bottling Rules and calculate the loss of Revenue arising from

manufacture/supply of country liquor less than the prescribed strength and quantity, take action u/S 42 of the Excise Act and inform the HQ."

7. Pursuant to the letter, dated 13.09.2012, of the Excise Commissioner, Bihar, Patna, the Collector, Nalanda, calculated a sum of Rs. 56,41,165/- as the loss of revenue incurred by the State government due to the sub-standard manufacturing and supplying of country liquor by the petitioner Company to the retail outlets, at Nalanda, and issued, accordingly, on 17.09.2012, a notice to show cause to the petitioner Company as to why action be not taken under Section 42(1)(h) of Bihar Excise Act, 1915, for the said breach of the condition of license and thereby causing loss of revenue to the tune of Rs. 56,41,165/-.

8. The petitioner Company submitted, on 24.09.2012, its reply to the show cause stating therein to the effect, inter alia, thus:

9. The samples of the same batch of country liquor, i.e. July, August and September, 2012, collected from the manufacturing unit of the petitioner Company and from the warehouse of Bihar State Beverage Corporation Limited, conformed to the prescribed strength and quantity of country liquor. Further, only the samples of country liquor, seized from the manufacturing unit of the petitioner Company and the godown of Bihar State Beverage Corporation Limited, which is a government undertaking, can be said to be authentic and genuine country liquor and, without any dispute, the country liquor could be said to have been manufactured and sold by the licensed manufacturer, i.e., the petitioner Company; but the samples of country liquor, seized from the premises of some retail outlets, could either be genuine or spurious country liquor manufactured and supplied from illicit sources. Considering the inflow of fake sachets of country liquor for clandestine sales, the possibility of the samples being illicit liquor procured from illegal manufacturing units cannot be ruled out and since there was no further enquiry in this regard, the petitioner Company cannot be held responsible to have supplied to the retail outlets the sachets of country liquor not conforming to the prescribed specifications.

10. On considering the show cause reply of the petitioner Company, the Collector, Nalanda, came to the conclusion that the explanation, furnished by the petitioner Company, was not satisfactory and accordingly directed, on 02.10.2012, as follows:

"Sub: With respect to deposit of Rs. 1,12,82,328 u/S 42(h)(i).

With reference to the aforementioned subject, an explanation was sought for from you vide office letter, No. 1064 dated 17.09.2012, the facts stated in the explanation submitted by you was considered scrupulously. Upon consideration the explanation was not found satisfactory and acceptable as country liquor is supplied to the Retail shops through Bihar State Beverage Corporation Limited from the warehouse of Director, M/s. Spicy Beverage Corp Pvt. Ltd. The sample of country liquor from warehouse and retail shops have been found to be manufactured by M/s. Spicy Beverage Pvt. Ltd., Manufactures of country liquor

was supplier warehouse, Biharsharif (Nalanda). The examination of the same has been done by Excise chemist, Bihar, Patna. Upon examination the Excise chemist Bihar, Patna has submitted report that the sample is of weaker strength of lesser quantity than the approved strength and quantity, resulting in loss of revenue. For the loss of revenue, the contractor, Under from 27 is guilty.

For causing loss of revenue on account of weak strength and less quantity, in terms of u/S 42(h)(i), it is order that Excise Duty and VAT of Rs. 56,41,164/- and equal penalty be paid within 15 days. As such of total amount of Rs. 1,12,82,328/- is not deposited by you within the prescribed time frame, your license shall be cancelled u/S 42 of the Excise Act."

11. Aggrieved by the order, dated 02.10.2012, the petitioner Company preferred an appeal, before the Board of Revenue, Bihar, which gave rise to Case No. 33 of 2012. The Board of Revenue, Bihar, by its order, dated, 17.02.2014, held that the petitioner Company had produced no witness to prove that the country liquor, in question, had not been manufactured by the petitioner Company, though the petitioner Company had succeeded in showing that the calculation of loss, sustained by the State, needed consideration with regard to the inclusion of movement fee.

12. By its order, dated 17.02.2014, the Board, therefore, directed the Collector, Nalanda, to look afresh into the issue of calculation of the quantum of penalty and decide the quantum of penalty after according proper hearing to the petitioner Company and as per provisions of law.

13. In other words, the Board has upheld, in the appeal, the finding of the Collector, Nalanda, that the seized samples were from the country liquor manufactured by the petitioner Company, but it has interfered with the quantum of loss, which had been directed to be paid by the Collector, Nalanda, to be paid by the petitioner Company, and, while remitting the case to the Collector, Nalanda, for the purpose of fresh calculation of the quantum of penalty, it (the Board) has directed the Collector, Nalanda, to decide the question of quantum of penalty after according proper hearing to the petitioner Company as per provisions of law.

14. The petitioner Company, thereafter, filed a review petition before the Board of Revenue, Bihar, against the order, dated 17.02.2014. The review petition gave rise to Case No. 6 of 2014. By its order, dated, 18.09.2014, the Board has dismissed the review petition.

15. It is in the backdrop of the facts as set out above that this writ petition, under article 226 of the constitution of India, has been filed by the petitioner Company seeking quashing of the order, dated 17.02.2014, passed in Case No. 33 of 2012, quashing of the order, dated 18.09.2014, passed in Case No. 6 of 2014, quashing of the order, dated 02.01.2012, passed by the Collector, Nalanda, and also to restrain the respondents to act pursuant to the order, dated 02.01.2012, aforementioned.

16. We have heard Mr. Y.V. Giri, learned Senior Counsel, appearing for the petitioner Company, and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondents.

17. It is submitted by Mr. Y.V. Giri, learned Senior Counsel, that by virtue of Section 42 of the Excise Act, 1915, respondent No. 3, Excise Commissioner, Patna, is the appellant authority against the order, which may be passed by the Collector, Nalanda, as the Licensing Authority and, by the order, dated 13.09.2012, since the Commissioner, Excise, Bihar, had directed the Collector, Nalanda, to calculate the loss incurred by the State Government due to substandard manufacturing and supplying of country liquor by the petitioner Company to the retail outlets in the District of Nalanda, the Collector, Nalanda, was left really with no option, but merely to calculate the loss alleged to have been sustained by the State and impose penalty on the petitioner Company.

18. It is pointed out by Mr. Giri, learned Senior Counsel, that consequent upon the direction given by the Excise Commissioner, Patna, by its order, dated 13.09.2012, the Collector, Nalanda, having obtained the show cause reply from the petitioner Company, held to the effect that the petitioner Company had caused, because of weak and less quantity of country liquor having been manufactured by them, a loss of Rs. 56,41,164/- and ordered that in terms of Section 42(1)(h)(i) of the Bihar Excise Act, 1915, excise duty and VAT of Rs. 56,41,164/- and an equal amount of penalty be paid by the petitioner Company within 15 days and if total amount of Rs. 1,12,82,328/- is not deposited by the petitioner Company within the specified period of fifteen days, the petitioner Company's license shall be cancelled under Section 42 of the Bihar Excise Act, 1915.

19. It is the submission of Mr. Giri, learned Senior Counsel, that the Collector, Nalanda, made no effort whatsoever to determine as to whether the samples, which had been seized from the retail outlets, were really manufactured by the petitioner Company or not, despite the fact that the petitioner Company had, in its reply to the show cause notice issued by the Collector, Nalanda, denied any lapse on its part in manufacturing and supplying country liquor.

20. Mr. Giri, learned Senior Counsel, further submits that the authority concerned did not produce any material to indicate that the seized samples from the retail outlets had, in fact, been manufactured by the petitioner Company and, thus, without the proof of the fact that the country liquor, in question, had been manufactured by the petitioner Company, the petitioner Company was saddled with the liability to pay the penalty under the threat of cancellation of their licence, though the petitioner Company could not have been legally penalized by either cancelling its license or by recovery of any sum of money from it without proof of the fact that the country liquor, in question, had been manufactured by the petitioner Company.

21. It is pointed out by Mr. Giri, learned Senior Counsel, that while making the

order, dated 17.02.2014, the Board did not undertake any exercise to determine if the Collector, Nalanda, had held any enquiry to determine whether the country liquor, which were seized from the retail outlets' stock, had been manufactured by the petitioner Company or not and without determination of this basic question, the order of the Collector, Nalanda, that the petitioner Company had supplied country liquor, which had been seized from the retail outlets, was wholly incorrect and illegal.

22. Resisting the writ petition, Mr. Lalit Kishore, learned Principal Additional Advocate General, has submitted that since the petitioner Company holds the exclusive privilege to manufacture and supply country liquor in the district of Nalanda, it has to be presumed that the country liquor, which had been seized in the present case from the retail outlets, were manufactured by the petitioner Company, particularly, when the said country liquor had the label of M/s. Spicy Beverage Private Limited as its manufacturer. In this regard, submits learned Principal Additional Advocate General, no material was produced on record by the petitioner Company to show that the petitioner Company was not the one, which had manufactured and supplied the country liquor to the retail outlets, in the district of Nalanda, which had been seized and/or that the country liquor, which had been seized from the retail outlets, had not been manufactured by the petitioner Company.

23. It is further submitted by Mr. Kishore, learned Principal Additional Advocate General, that the materials on record clearly justify passing of the order, dated 02.10.2012, by the Collector, Nalanda, directing that if a sum of Rs. 1,12,82,328/-, which includes loss of excise duty, movement fee, VAT and the amount of penalty, is not deposited, within fifteen days from the date of the order, by the petitioner Company, the licence of the petitioner Company will be cancelled.

24. While considering the correctness of the rival submission made before us, it needs to be noted that burden of proof rests on that person, who wants a judicial or quasi judicial authority to believe in the existence of a given fact. Viewed from this angle, when the Excise Department had invoked the provisions of Section 42(1)(a) of the Bihar Excise Act, 1915, by contending that the country liquor manufactured by the petitioner Company had been found to have not conformed to the standards prescribed and when the petitioner Company had contended that the said seized samples of country liquor were spurious and had not been manufactured and supplied by the petitioner Company, it logically follows that it was incumbent, on the part of the licensing authority, to bring necessary materials on record to establish the fact that the country liquor, in question, had, indeed, been manufactured by the petitioner Company.

25. The licensing authority failed in making even a faint attempt to prove that it was the petitioner Company, which had, as a matter of fact, manufactured and supplied the said country liquor. Mere finding of the label of the petitioner Company on the bottles of the country liquor, which had been seized, did not, in

the light of the denial of the petitioner Company, can be said to have proved that the seized country liquor had been manufactured and supplied by the petitioner Company. The least, which could have been done by the licensing authority, was to produce such materials on record, either by examining the retailers or by production of other documentary materials, which would show that the retail outlets had, indeed, purchased or received the said country liquor from the petitioner Company. This minimum requirement of law having not been fulfilled in the present case, no order could have been passed by the Collector, Nalanda, imposing any penalty on the petitioner Company for alleged loss of revenue suffered by the State Government or threatening the petitioner Company with cancellation of licence in the event of the petitioner Company failed to pay the penalty.

26. There is also considerable force in the submission of Mr. Giri, learned Senior Counsel, that the Excise Commissioner's order, dated 13.09.2013, was virtually a direction to the Collector, Nalanda, to calculate the loss of revenue suffered by the State Government and leaving the Collector, Nalanda, with no discretion to determine if the country liquor seized from the ten retail outlets had or had not been manufactured and supplied by the petitioner Company.

27. We are aghast with the manner in which the order, dated 13.09.2012, has been passed by the Commissioner of Excise, Bihar, holding the petitioner Company responsible for manufacturing and supplying sub-standard country liquor to the retail outlets and leaving thereby the competent authority, namely, the Collector, Nalanda, who is the licensing authority, with no observation to determine if the seized samples of country liquor had or had not been manufactured and supplied by the petitioner Company.

28. The Commissioner of Excise, Bihar, could have, at best, given a direction to the Collector, Nalanda, as the licensing authority, to determine if the seized country liquor had been manufactured and supplied by the petitioner Company or not and if the petitioner Company was found to have manufactured and supplied the country liquor to the retail outlets, then, to calculate the loss of revenue, which might have been suffered by the State Government and impose penalty accordingly.

29. As the Commissioner of Excise, Bihar, while making the order, dated 13.09.2012, did not leave the Collector, Nalanda, as the licensing authority, with any option to determine if the seized country liquor had or had not been manufactured and supplied by the petitioner Company, the order, dated 13.09.2012, cannot be sustained and is accordingly set aside.

30. Similarly, as the Collector, Nalanda, having not made any real effort to determine whether the seized country liquor had or had not been manufactured and supplied by the petitioner Company, failed to exercise his jurisdiction in accordance with law and, therefore, the order, dated 02.10.2012, imposing penalty could not have been upheld and ought not to have been upheld by the

Board of Revenue.

31. In short, while the order of the Commissioner of Excise, Bihar, suffered from exercise of such jurisdiction, which did not vest in him, the order, dated 02.10.2012, passed by the Collector, Nalanda, suffered from omission to exercise the jurisdiction, which really vested in him.

32. Sadly enough, even the Board did not apply its mind to the factual background of the present case and determine if the licensing authority's order was in consonance with law or not inasmuch as the Board of Revenue made no effort to determine if the licensing authority had satisfied itself on the basis of the materials on record, whether the petitioner Company had or had not manufactured and supplied the seized liquor, particularly, when the petitioner Company had denied that the seized country liquor had been manufactured and supplied by the petitioner Company.

33. Because of what have been discussed and pointed out above, the order, dated 13.09.2012, passed by the Commissioner of Excise, Bihar, is hereby set aside and quashed. We also set aside and quash the order, dated 17.02.2014, as well as the subsequent order, dated 18.09.2014, passed by the Board of Revenue.

34. We further set aside and quash the order, dated 02.10.2012, passed by the Collector, Nalanda, and direct that the Collector, Nalanda, shall undertake afresh exercise to determine if the seized samples had been manufactured by the petitioner Company. Depending upon the answer, which may be found by the Collector, Nalanda, he shall pass such further or other orders, in accordance with law, as may be warranted in the facts and circumstances of the case.

35. With the above observations and directions, this writ application shall stand disposed of.