

(2019) 07 PAT CK 0160

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 23783, 23163, 24302 Of 2018, 119, 8008, 8294 Of 2019

Umesh Kumar And Ors

APPELLANT

Vs

State Of Bihar Through The Principal Secretary

RESPONDENT

Date of Decision : 09-07-2019

Acts Referred:

Bihar Prohibition And Excise Act, 2016 — Section 2(16), 2(32), 2(40), 2(40)(v), 3, 30(a), 30(c), 30(d), 32, 56, 97
Mahua Flower Act, 2016 — Section 2(e), 3, 5, 13
Bihar Excise (Mahua Flowers) Rules, 2006 — Rule 3, 32

Citation : (2019) 07 PAT CK 0160

Hon'ble Judges : Jyoti Saran, J; Partha Sarthy, J

Bench : Division Bench

Advocate : Shailesh Kumar, Kumar Manish, Ajay Mukherjee, Sunil Kumar Pandey, Vivek Prasad, Tej Narayan Singh, Satya Prakash Parasar, Dhananjay Kumar Pandey, Vikash Kumar

Final Decision : Allowed

Judgement

Heard learned counsel appearing for the petitioners and learned counsel appearing for the State in the set of writ petitions.

It is because in each of these cases the petitioners have been subjected to proceedings under the Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as 'the Act') read alongside the provisions of the Bihar Excise (Mahua Flowers) Rules, 2006 (hereinafter referred to as 'the Mahua Flowers Rules') for alleged recovery of Mahua Flowers exceeding 5 Kg. that the proceedings have been instituted under 'the Act', leading to arrest as well as seizure of the respective vehicles of the petitioners which were found transporting these flowers.

These writ petitions question the seizure as well as pray for release of the respective vehicles but at the foundation of each of the writ petitions lies the main issue i.e. "whether in view of the legal position reflecting from the

provisions of 'the Act' and 'the Mahua Flowers Rules' which was framed under the since repealed Bihar Excise Act, 1915 but has been saved under the provisions of Section 97 of 'the Act', a simple recovery of Mahua Flowers exceeding 5 kg. can be a subject matter of proceedings under 'the Act'?"

It is bearing note of this proposition which transpired during the course of argument when the writ petitions came up for considerations that this Court while recording its order on 29.04.2019 in CWJC No. 23163 of 2018 observed thus:

" Be that as it may, the issue which engages this Court to seek response from the respondents is whether Mahua flowers on its own are capable of being seized leading to initiation of confiscation case by taking recourse to the provisions of the Bihar Prohibition and Excise Act, 2016 bearing in mind that while provision of Section 56 of the Act which lists the things for confiscation does not include Mahua Flower, Section 2(16) of the Act includes Mahua within the ambit of country liquor or traditional liquor only when it is converted into plain or spicy spirit. There is although an impediment for the petitioner in the Bihar Excise (Mahua Flowers) Rules, 2006 which does not permit any person to possess more than 5 kgs. Mahua and in so far as the present set of cases are concerned, the petitioners were found in possession of Mahua flowers exceeding the limit, i.e. 5 kgs. but according to Mr. Shailesh Kumar, learned counsel for the petitioner, the Mahua Flower Rules, 2006 does not conceive of seizure or initiation of confiscation proceeding on alleged violation, no consequences either, have been spelt out in the Act for alleged violation of its provision. According to learned counsel until such time that these flowers are converted into spirit, the persons concerned cannot be subjected to prosecution or confiscation proceeding."

While keeping the larger issue so taken, open for discussion and allowing time to the State to respond to the issue noted as to whether the petitioners at all could be subjected to proceedings under 'the Act' that this Court by way of interim relief while provisionally releasing the vehicles in some of the case, adjourned the matters for hearing on the issue so noted above.

These matters came up for consideration on 25.06.2019 but was adjourned until today on the request made by learned State Counsel making it very clear that it would be posted with a view to final disposal. The affidavits so filed in the present proceedings do support the action impugned but are silent as to the source of power for initiating such proceedings. We thus have allowed learned State Counsel as represented through its Counsel to address the matter on merits in the backdrop of the legal statutory provisions that accompanies the proceedings.

While the arguments of learned counsel for the petitioners centers around the issues noted in our order dated 29.4.2019 noted above, in opposition thereof, Mr. Kumar Manish, learned Standing Counsel No. 5, Mr. Vivek Prasad, learned GP-7 and Mr. Vikash Kumar, learned SC-11 have addressed the Court on behalf of the

State and in support of the impugned action.

Learned counsel for the State have relied upon the provisions of Rule 3 of 'the Mahua Flowers Rules' to submit that any possession beyond a quantity of 5 Kg. is held violative of the Rules and since the provisions underlying Section 2(40) of 'the Act' which defines 'intoxicant' means and includes any substance which is capable of being converted into liquor and allows the State Government to notify such substance by way of notification coupled with the fact that the definition of 'country and traditional liquor' as found in Section 2(16) of 'the Act' makes it clear that the Mahua is capable of being converted into spirit, the State in its Excise Department was fully within its jurisdiction to initiate proceedings which suffers no infirmity.

Learned counsel have also referred to the provisions of Section 56 of 'the Act' to submit that any material possessed by any person which is capable of being converted into intoxicant, is liable for confiscation and in circumstance where there is a recovery of huge quantity of Mahua Flowers there is a presumption as to a commission of offence under Section 32 of 'the Act'. It is placing reliance on these provisions that an attempt has been made to justify the impugned action.

We have heard learned counsel for the parties and we have perused the records. There is absolutely no confusion that 'the Mahua Flowers Rules' which was notified through the notification, S.O. 439 dated 24.01.2007 in its Rule 3 prohibits a possession of Mahua Flower exceeding 5 Kg. and reads thus:

"3. Possession of Mahua Flowers.- No person other than a person duly authorized by the person holding a licence for the collection of Mahua flowers, one of the bases of country liquor, shall collect or possess more than five kilogram of mahua flowers without a licence granted under these Rules."

These Rules were framed under the since repealed Bihar Excise Act, 1915 but the provisions of Section 97 of the present Act saves these Rules and thus there is no doubt on its validity. The trouble for the respondents is that even though 'the Mahua Flower Rules' draws parameters for possession of Mahua Flowers within 5 kg., there is no penal consequences attached to any violation of this limit. In fact the Rules very elaborately lays down procedure for a person who intends to possess Mahua Flower exceeding 5 kg. to obtain a licence in such a condition but then no penal action has been drawn in case any person is found in possession of Mahua Flowers exceeding the quantity. As we have noted above, though 'the Mahua Flower Rules' were framed under the repealed Bihar Excise Act, 1915 and has been saved under Section 97 of the present Act but even the present Act does not provide for consequences of such violation. Had it been so, then definitely we would have gone with the arguments advanced by the learned State Counsel in supporting the impugned action but unfortunately even though 'the Act' provides a prosecution it is only when the Mahua Flower is converted into spirit to fall within the definition of country or traditional liquor as defined in Section 2(16) of 'the Act'.

In fact the provision is self explanatory and it is only when Mahua flowers is converted to spirit or spiced spirit that it falls in the category of country or traditional liquor and such is the position with some other food items like rice, gur or any other grain which fall within the same category, if it is used for manufacture of spirit or spiced spirit. The bottom line is that it is only when these raw materials are converted into plain or spiced spirit that they fall within the definition of 'country or traditional liquor' and consequentially fall within the prohibitory jurisdiction of 'the Act'.

Learned counsel appearing for the State have placed strong reliance on the provisions of Section 2(40)(v) of 'the Act' which enables the State Government to notify any substance as 'intoxicant' within the meaning of 'the Act' and have canvassed that a presumption of commission of an offence in terms of Section 32 of 'the Act' exists because there is a recovery of huge quantity of Mahua flowers and which would lead to such presumption.

In our opinion the arguments of learned State Counsel would fail for three reasons, namely:

(a) Had it been a case where the recovery was made from a place which was being used for manufacture of spirit from Mahua flowers along with implements which gave sufficient indication of the proposed conversion, definitely there lay reasons for holding such presumption and for initiation of prosecution but in the present case the flowers in question have been seized during the course of transportation and not from a place where manufacturing activity was going on.

(b) Where the legislature has been very specific while defining country or traditional liquor to bring within a prohibitory jurisdiction a spirit converted from Mahua then until such time that such flowers are either converted into spirit or are in a process towards such manufacturing, a mere suspicion would not clothe the respondents with jurisdiction towards penal action.

(c) Where 'the Act' specifically lays down the circumstances in which Mahua Flowers would come within the prohibited jurisdiction on its conversion into spirit, then neither Section 2(40) nor Section 2(32) would empower the authorities to initiate proceedings of the present kind unless 'the Mahua Flower Rules' itself is appropriately amended to provide for a consequential penal action for violation of Section 3 which is not the case.

In our opinion, considering that Section 2(16) of 'the Act' specifically deals with the issue of Mahua flowers along with some other items which are capable of being converted into plain or spiced spirit, the reliance by learned counsel for the respondents on the provision of Rule 32 which has a general application over items other than those classified in Section 2(16) or Section 2(40) (v) which enables the State Government to notify any item as an intoxicant would not come to their aid in justification of the impugned actions.

For the discussions above, we find the proceedings initiated against the

petitioners for alleged recovery of Mahua flowers exceeding 5 Kg. which lies at the foundation for such penal action under 'the Act' and the 'Mahua Flowers Rules', absolutely without jurisdiction because we neither find such enabling powers in the respondents to initiate any action under 'the Bihar Mahua Flowers Rules' nor 'the Act' enables the respondents to initiate action on mere possession of Mahua Flowers, until, it is converted either into plain or spiced spirit as clearly defined under Section 2(16) of 'the Act'.

Since 'the Mahua Flowers Rules' allows any person to remain in possession of Mahua Flowers to the extent of 5 kg. without any licence and any quantity in excess thereof, is to be done under a licence, the quantity possessed by the respective petitioners in excess of 5 kg., without a licence, may be a statutory violation and thus capable of retention by the State Government but in absence of any penal action so provided under 'the Rules' or 'the Act' for possession of these flowers exceeding the limit, even if the State Government would be within its jurisdiction to retain the same, the confiscation proceedings cannot be allowed to continue.

In result, we hold that the confiscation proceedings, if any, initiated against the petitioners for alleged violation of Section 3 of 'the Mahua Flowers Rules' read alongside the provisions of 'the Act' for possession of Mahua Flowers exceeding 5 kgs., is without sanction of law and consequentially the confiscation proceeding, if any, initiated against the petitioners shall stand quashed and the vehicles seized, if not already released, shall be released in favour of the owner on production of ownership papers.

Re: CWJC No. 8294/2019 & CWJC No. 8008/2019.

For the conclusion that we have drawn above holding the proceedings initiated for possession of Mahua Flowers unsustainable and consequentially quashed the confiscation proceeding, if any, initiated, we hereby direct the District Magistrate, Jamui/ District Magistrate, Gaya respectively to ensure release of the following vehicles on production of ownership papers:

(1) Bolero Pick Up four wheeler bearing registration No. BR02GA0524, Chasis No. MA1ZN2GHKG1C28180, Engine No. GHG1C19649 of the petitioner in CWJC No.8294 of 2019 which has been seized in connection with Case No. 19C2/2019 for the alleged offence punishable under Section 30(a)/30(c) of the Bihar Prohibition and Excise Act, 2018 alleging recovery of 210 kgs of Mahua flower; and

(2) Mahendra Bolero Pick-up Van bearing registration no. JH13B 5862, Engine No. GHE1G 44288, Chasis No. MA17N2GHKE1G56195 which has been seized in Excise Case no. 186/2018 for the alleged offence punishable under Section 30(d) of Bihar Prohibition of Excise Act, 2016 and Section 2(e),3,5,13 of Mahua Flower Act, 2016 alleging recovery of 1800 kgs of Mahua flowers.

The writ petitions are allowed.

The interim order passed in C.W.J.C.No. 23163/2018, C.W.J.C.No. 23783/2018, C.W.J.C.No. 119/2019 and C.W.J.C.No. 24302/2018 for the release of the vehicles shall stand confirmed.