

HIGH COURT OF MADHYA PRADESH; BENCH AT GWALIOR
(Division Bench)

W A No. 425/2016

APPELLANTS : **State of Madhya Pradesh and Others**

Versus

RESPONDENT : **M/s Pernod Ricard India (P) Ltd.**

CORAM: **Hon'ble the Chief Justice Shri Hemant Gupta**
Hon'ble Shri Justice Sanjay Yadav

Present:

For Appellants: Shri Ajay Kumar Sharma, Assistant Commissioner,
Excise, Gwalior, Officer-in-Charge in person.

For Respondent: None present.

Whether Approved for Reporting : Yes

Law Laid Down: Amendment in Rule 19(2) of M.P. Foreign Liquor Rules, 1996. Following the Supreme Court judgment reported as *District Collector, Vellore District v. K. Govindaraj, (2016) 4 SCC 763* the Court held that amendment in the Statute or the Rules is prospective unless it is specifically made retrospective. However, the amendment in respect of procedure is retrospective. The question: as to whether penalty should be three times of the duty or not is not a matter of procedure. It deals with substantive rights of parties. Therefore, the amendment carried out on 29th March, 2011 liberalizing the amount of penalty will operate prospectively only.

Significant Paragraph Nos. 11, 12, 13 and 14

JUDGMENT (ORAL)
(29-06-2017)

Per: Hemant Gupta, Chief Justice

This order shall dispose of bunch of appeals bearing Writ Appeal Nos.425/2016, 6/2017, 7/2017, 8/2017, 9/2017, 10/2017, 11/2017, 12/2017, 13/2017, 14/2017, 15/2017, 16/2017, 17/2017, 19/2017, 20/2017, 21/2017, 22/2017, 23/2017, 24/2017, 25/2017, 26/2017, 27/2017, 28/2017, 29/2017, 30/2017, 31/2017, 32/2017, 33/2017, 34/2017, 35/2017, 36/2017, 37/2017, 38/2017, 39/2017, 40/2017, 41/2017, 42/2017, 43/2017, 87/2017 and Writ Appeal No.100/2017 arising out of a common order dated 01.12.2015 whereby the writ petitions were allowed and the orders dated 22.11.2011, 02.05.2013 and

10.05.2013 passed by the Deputy Commissioner, Excise, Gwalior; Commissioner, Excise and the Board of Revenue respectively were set aside. The question of fact and law is common in all these appeals.

2. The issue is short. The writ-petitioner is a sub-licensee as per the provisions of the M.P. Excise Act, 1915 (for short "the Act"). The writ-petitioner is a manufacturer of Indian-made foreign liquor. The sale of foreign made liquor is governed by M.P. Foreign Liquor Rules, 1996 (for short "the Rules"). Rule 16 of the said Rules deals with the permissible limits of losses sustained during transportation of the foreign liquor whereas Rule 19 of the Rules deals with imposition of penalty if liquor is found short at the destination point as compared to the quantity, which was sent.

3. The relevant year of sub-licence is the year 2009-10. The relevant provisions of the Rules, as were existing in 2009-10, read as under:-

"16. Permissible Limits of Losses.- (1) An allowance shall be made for the actual loss of spirit by leakage, evaporation etc., and of bottled foreign liquor by breakage caused by loading, unloading, handling etc. in transit, at the rate mentioned hereinafter. The total quantity of bottled foreign liquor transported or exported shall be the basis for computation of permissible losses.

(2) Wastage allowances on the spirit transported to the premises of F.L. 9 or F.L. 9A licensee shall be the same as given in sub-rule (4) of rule 6 of the Distillery Rules, 1995.

(3) Maximum wastage allowance for all exports of bottled foreign liquor shall be 0.25% irrespective of distance.

(4) Maximum wastage allowance for all transports of bottled foreign liquor shall be 0.1% if the selling licensee and the purchasing licensee belong to the same district. It shall be 0.25% if they belong to different districts."

19. Penalties. - (1) Without prejudice to the provisions of the Act, or condition No.4 of licence in form F.L. 1, condition No.7 of licence in Form F.L. 2, condition No.4 of licence in form F.L.

3, the Excise Commissioner or the Collector may impose a penalty not exceeding Rs.50,000 for contravention of any of these rules or the provisions of the Act or any other rules made under the Act or the order issued by the Excise Commissioner.

(2) On all deficiencies in excess of the limits allowed under Rule 16 and Rule 17, the F.L. 9 or F.L. 9A, F.L. 10-A or F.L. 10-B licensee shall be liable to pay penalty at a rate exceeding three times but not exceeding four times the maximum duty payable on foreign liquor at that time, as may be imposed by the Excise Commissioner or any officer authorised by him:

Provided that if it be proved to the satisfaction of the Excise Commissioner or the authorised officer that such excess deficiency or loss was due to some unavoidable cause like fire or accident and its first information report was lodged in Police Station, he may waive the penalty imposable under this sub-rule.

(3) The Excise Commissioner or the Collector may suspend or cancel the licence under Section 31 of the Act upon a contravention of any of these rules or provisions of the Act, or any other rules made under the Act, or the orders issued by the Excise Commissioner.”

4. The explanation of the writ-petitioner for shortage in the consignment was that if on account of any accident there is any loss, the sub-licensee cannot be burdened with the penalty. Considering the said plea, the departmental Authorities have returned concurrent finding that the explanation of the writ-petitioner is not acceptable. The learned Single Judge allowed the writ petition against the said orders on the ground that sub-clause (2) of Rule 19 has been amended on 29th March, 2011, which provides for a penalty not exceeding the amount of duty, therefore, the three times of the penalty amount cannot be imposed.

5. The learned Single Bench was of the opinion that the provisions applicable on the date of the order would be applicable. The reliance was placed upon the Supreme Court judgments reported as *State of Rajasthan v. Mangilal Pindwal*, AIR 1996 SC 2181, *West U.P. Sugar*

Mills Association v. State of U.P., AIR 2002 SC 948 and ***Government of India v. India Tobacco Association***, (2005) 7 SCC 396.

6. None has put in appearance on behalf of the respondents/writ-petitioner - presumably in view of the call given by the Bar Association to abstain from this Court. The Resolution dated 28.06.2017 of the Bar Association reads as under:-

“उच्च न्यायालय अभिभाषक संघ, ग्वालियर

दिनांक 28.06.2017

प्रति,

माननीय प्रिंसिपल रजिस्ट्रार महोदय जी,
मध्यप्रदेश उच्च न्यायालय
खण्डपीठ ग्वालियर

विषय:- न्यायमूर्ति श्री संजय यादव जी की एकल एवं युगल पीठ से कार्य से विरत रहने के सम्बंध में सूचना प्रदान करने बावत्।

उपरोक्त विषय में निवेदन है कि उच्च न्यायालय अभिभाषक संघ, ग्वालियर के सभी सदस्यगण दिनांक 23 जून को अभिभाषकों के साथ ली गई साधारण बैठक में लिये गये निर्णय के अनुसार न्यायमूर्ति श्री संजय यादव जी की पीठ के समक्ष कार्य से विरत रहेंगे।

चूंकि दिनांक 30 जून 2017 तक श्री संजय यादव जी मुख्य न्यायाधिपति श्री हेमंत गुप्ता जी के साथ युगल पीठ में है इसलिये उक्त युगल पीठ से दिनांक 30 जून 2017 तक सभी अभिभाषकगण कार्य से विरत रहेंगे।

हस्ता/-

वीरेन्द्र पाल

सचिव

उच्च न्यायालय अभिभाषक संघ, ग्वालियर”

7. Since, it is a voluntary act of the members of the Bar to abstain from work, but, such abstaining from work by the members of the Bar cannot be a ground for deferring the hearing when the matter is pending before this Court for some time and that too relating to the revenue of the State. Therefore, we have no option but to go through the record and proceed with the decision of the present appeals.

8. We have heard the Officer-in-Charge present on behalf of the appellants-State and perused the record and find that the order passed by the learned Single Bench cannot be sustained in law.

9. In the present appeal, the Officer-in-Charge of the case argued that 2009-10 is the licence period. If there is any shortage in the consignment at the destination station, the Rule which is applicable on the date of shortage would be applicable and not the Rule which was subsequently amended. Each licence year is relevant for determining the rights and liabilities of the sub-licensee such as the petitioner, therefore, the order passed by the learned Single Bench cannot be sustained in the eye of law. Amended Rule 19 (2) of the Rules reads as under:-

19. Penalties. - (1) xxxxxx

(2) On all deficiencies in excess of the limits allowed under Rule 16 and Rule 17, the F.L. 9, F.L. 9-A, F.L. 10-A or F.L. 10-B Licensee shall be liable to pay penalty at a rate not exceeding the duty payable on foreign liquor at that time, as may be imposed by the Excise Commissioner or any officer authorised by him:

Provided that if it be proved to the satisfaction of the Excise Commissioner or the authorised officer that such excess deficiency or loss was due to some unavoidable causes like fire or accident and its first information report was lodged in concerned Police Station, he may waive the penalty imposable under this sub-rule. ”

10. The writ-petitioner is a bottling licensee in terms of Rule 8(1)(i) of the Rules. The period of licence is prescribed in Sub-Rule (2) of Rule 8. The relevant Rules read as under:-

“8. Sale of Foreign Liquor.-(1)Categories of licences. - Licences for the sale of foreign liquor shall be of the following categories and the mode of grant of these licences shall be as indicated hereunder:-

(i) F.L. 9- (Bottling Licence). - Holder of an F.L. 9 licence which may be granted for bottling of foreign liquor, may manufacture and bottle foreign liquor by blending, compounding and reducing spirit. The licensee may sell or transfer foreign liquor to F.L. 6, F.L. 10 and F.L. 11 licensees including the

licensees of other States. He shall pay bottling fee at the prescribed rate.

(2) **Period of licences and their renewal.** - Licences in Forms F.L.-1, AAAA F.L. 1B, F.L. 2, F.L. 3, F.L. 4, F.L. 5, F.L.6, F.L.7, F.L. 8, F.L. 9, F.L. 9A and F.L. 11 may be granted for one year and in Form F.L. 5 for a particular occasion on prepayment of licence fee fixed by the State Government which may be revised from time to time. All these licences including licence in forms F.L. 9, F.L.9A and F.L. 11 but excluding licence in Form F.L. 5 will be subject to renewal every year on payment of the prescribed licence fee, subject to good conduct and clean records of the licensee and due observance of licence conditions. Provisions of Act and rules made thereunder. The licences in Forms F.L. 1, F.L. 1AAA, F.L. 1AAAA, F.L. 1B, F.L.1D and F.L. 10A (F.L. 10-B) shall be granted for a period of one year or a shorter period unless directed otherwise by the State Government).”

11. A perusal of the said provision would show that the licence granted to the petitioner was for one year, which was subject to renewal every year on payment of prescribed fee. Once the licence is granted for a year, therefore, the Rule as is applicable during the relevant licence year alone would be applicable to determine the rights and liabilities of such licensee. The relevant licence year is 2009-10, therefore, the Rule which is applicable in that licence year alone would be applicable. Rule 19(2) was amended on 29th March, 2011, which is subsequent to the licence year, therefore, the penalty is imposable in terms of Rule 19(2) applicable for the licence year 2009-10.

12. The Supreme Court in a judgment reported as *Ashok Lanka and Another v. Rishi Dixit and Others*, (2005) 5 SCC 598 was examining Chhattisgarh Excise Settlement of Licences for Retail Sale of Country/ Foreign Liquor Rules, 2002. The eligibility condition was changed

after notice inviting applications was published. The notice inviting applications for grant of licence was issued on 14.02.2005 but the Rules were amended vide Notification dated 22.03.2005. The amended Rules were sought to be made applicable in respect of advertisement which was already issued. The Court was considering the reverse proposition as in the present case and held as under:-

“62. A statute must be read reasonably. A statute should not read in such a manner which results in absurdity. A statute, on its plain language, although postulates a prospective operation, it cannot be held to be retrospective only because it would apply for the excise year for which applications were invited despite the fact that the selection process made thereunder is over. The State is bound by the terms of the advertisement and the Rules existing at that time. The statutory authorities and the applicants are expected to follow the law as it stood thence. No step could be taken on the presupposition that the rule would be amended. It is also not a case where draft rules were already in existence and such draft rules had been applied, which could otherwise be permissible in law. But a situation of this nature is not contemplated in law.”

13. It is well settled that the amendment in the Statute or the Rules is prospective unless it is specifically made retrospective. However, the amendment in respect of procedure is retrospective. As to whether penalty should be three times of the duty or not, is not a matter of procedure. It deals with substantive rights of the party. Therefore, amendment carried out on 29th March, 2011 will operate prospectively only. It is the settled principle which was reiterated by the Supreme Court in a judgment reported as *District Collector, Vellore District v. K. Govindaraj*, (2016) 4 SCC 763. The Court held as under:-

“13 As mentioned above, though the legislature has plenary powers of legislation within the fields assigned to it and can legislate prospectively or retrospectively, the general rule is that in the absence of the enactment specifically mentioning that the legislation or legislative amendment concerned is retrospectively made, the same is to be treated as prospective in nature. It would be more so when the statute is dealing with substantive rights. No doubt, in contrast to statute dealing with substantive rights, wherever a statute deals with merely a matter of procedure, such a statute/amendment in the statute is presumed to be retrospective unless such a construction is textually inadmissible. At the same time, it is to be borne in mind that a particular provision in a procedural statute may be substantive in nature and such a provision cannot be given retrospective effect. To put it otherwise, the classification of a statute, either substantive or procedural, does not necessarily determine whether it may have a retrospective operation. In *Maxwell v. Murphy*, (1957) 96 CLR 261 (Aust), Dixon, C.J. formulated the aforesaid procedure in the following words:

“The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But given rights and liabilities fixed by reference to the past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption.”

14. Since the levy of penalty is not a matter of procedure, therefore, the amendment carried on 29th March, 2011 will apply only to the licences granted thereafter and not in respect of licences granted earlier,

which will be governed by the Rules applicable at the time of grant of licence.

15. In view thereof, we find that the order passed by the learned Single Bench is not sustainable in law. Accordingly, the same is set aside. The writ appeals are **allowed**.

(HEMANT GUPTA)
Chief Justice

(SANJAY YADAV)
Judge

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