

THE HIGH COURT OF MADHYA PRADESH

W.P.No.1481/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1482/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1485/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1486/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1487/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1488/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1489/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1490/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.1491/2016

(M/s Associated Alcohol & Breweries Ltd. vs. State of M.P. & Ors.)

W.P.No.690/2017

(M/s Associated Alcohol and Breweries Ltd. vs. State of M.P. & Ors.)

Gwalior, Dated : 30.11.2018

Shri V.K. Bhardwaj, Senior Counsel with Shri Anand Bhardwaj, Counsel for the petitioners.

Smt. Nidhi Patankar, Government Advocate for the Respondents/State.

By this common order, W.P.Nos.1481/16, 1482/16, 1485/16, 1486/16, 1487/16, 1488/16, 1489/16, 1490/16, 1491/16 and 690/17, are being disposed off as common question of law is involved.

Earlier, this Court by order dated 25-4-2017 had directed as under :

“Learned Counsel for the parties are in unison in respect of their submissions that

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it would be appropriate if present controversy would be decided once the said petition (W.P. 525/2017) is decided by the Division Bench of this Court.

Considering the submissions advanced by the parties, let this petition be placed as Sine Die. Parties are directed to renew their prayer for further hearing; once the controversy is decided by the Division Bench of this Court wherein vires of the Rules have been challenged."

The Division Bench of this Court, by order dated 2-8-2016 has observed as under :

"These petitions take exception to action of State and its functionaries in imposing the penalty in exercise of powers under Rule 4(4) of Madhya Pradesh Country Spirit Rules, 1995 and Rule 4(4) of Madhya Pradesh Distillery Rules, 1995. As the validity of these Rules are not challenged in these batch of petitions, office is directed to list the matter before Single Bench."

Accordingly, these batch of petitions have been listed before this Court for hearing on merits.

For the sake of convenience, the facts of W.P. No. 1486 of 2016 shall be taken into consideration.

The necessary facts for the disposal of the present writ petition in short are that a show cause notice dated 6-11-2009 was issued, calling upon the petitioner to show cause as to why the penalty be not imposed under M.P. Distillery Rules, 1995 (In short Distillery Rules, 1995) due to transit loss of Rectified spirit/E.N.E. Total 5,64,480 proof litre of rectified spirit was exported and after the same reached to the destination, it was found that there was a

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transit wastage of 5090.29 proof litre and 3961.33 proof litre of transit wastage was in excess of what is permissible under Rule 6(4) of Distillery Rules, 1995, and accordingly, the show cause notice was issued as to why the penalty be not imposed.

Show causes notices were issued for six times, and ultimately, the petitioner filed its reply and admitted that there was an excessive transit wastage, but submitted that the additional transit wastage was due to bad conditions of road, and leakage. It was submitted that the tankers were loaded in the presence of the Excise officers, therefore, there was no deliberate act on the part of the petitioner. Because the distance between two warehouses was more, therefore, more transit wastage has taken place, for which the petitioner is not responsible.

The reply submitted by the petitioner was not found to be satisfactory, therefore, the Dy. Commissioner, Flying Squad, Division Indore, by order dated 23-4-2012 imposed the penalty of Rs. 1,18,840 for the additional transit wastage.

Being aggrieved by the order of the Dy. Commissioner, Flying Squad, the petitioner filed an appeal, which too was dismissed by the Excise Commissioner, Madhya Pradesh, Gwalior by order dated 19-6-2013. The order of the Excise Commissioner, was challenged before the Board of Revenue, and the said appeal has also been dismissed by the Board of Revenue by order dated 9-2-2016.

Challenging the orders dated 23-4-2012 passed by Dy. Commissioner, order dated 19-6-2013 passed by Excise Commissioner, and order dated 9-2-2016, passed by the

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Board of Revenue, it is submitted that since the tankers had reached to the destination in the sealed condition and there is no allegation that the said seal was found to be tempered, therefore under this circumstance, it cannot be said that the petitioner is responsible for the transit wastage.

Per contra, it is submitted by the Counsel for the State that as per Rule 6(4) of Distillery Rules, 1995, Transit Wastage which is permissible under the Distillery Rules, 1995 has been prescribed, and in the present case, undisputedly, transit wastage was found in excess of what is provided under the Distillery Rules, 1995 and thus, the authorities were well within their jurisdiction to impose the penalty as provided under Rule 8(4) of Distillery Rules, 1995.

Heard the learned Counsel for the Parties.

It is well established principle of law that trade in liquor is not a fundamental right but is a privilege. The Supreme Court in the case of **Khoday Distilleries Ltd. Vs. State of Karnataka** reported in **(1995) 1 SCC 574** has held as under :

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

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

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them. Those implied limitations are made explicit by clauses (2) to (6) of Article 19 of our Constitution.

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

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

(d) Article 47 of the Constitution considers intoxicating drinks and drugs as injurious to health and impeding the raising of level of nutrition and the standard of living of the people and improvement of the public health. It, therefore, ordains the State to bring about prohibition of the consumption of intoxicating drinks which obviously include liquor, except for medicinal purposes. Article 47 is one of the directive principles which is fundamental in the governance of the country. The State has, therefore, the power to completely prohibit the manufacture, sale, possession, distribution and consumption of potable liquor as a beverage, both because it is inherently a dangerous article of consumption and also because of the

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directive principle contained in Article 47, except when it is used and consumed for medicinal purposes.

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

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

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

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

(i) The State can carry on trade or business in potable liquor notwithstanding that it is an intoxicating drink and Article

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47 enjoins it to prohibit its consumption. When the State carries on such business, it does so to restrict and regulate production, supply and consumption of liquor which is also an aspect of reasonable restriction in the interest of general public. The State cannot on that account be said to be carrying on an illegitimate business.

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

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

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

(m) The restrictions placed on the trade or business in industrial alcohol or in

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medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage."

Rule 6(4) of Distillery Rules, 1995, reads as under :

"6. Issue of spirit, margin of deviation and permissible limits of wastage :

(1).....

(2).....

(3).....

(4) Transit Wastage : An allowance shall be made for the actual loss in transit by leakage or evaporation of spirit transported from distillery to distillery, distillery to warehouse, warehouse to warehouse in this State or exported in drums/tankers, at a rate not exceeding the maximum quantities specified below :

| | |
|----------|---|
| Distance | Maximum rate of wastage allowance |
|----------|---|

In Drums

- | | | |
|-----|---|-------------|
| i | Upto 250 Kilometers | 0.3 percent |
| ii | Above 250 Kilometers but not exceeding 500 Kilometers | 0.4 percent |
| iii | Above 500 Kilometers | 0.5 percent |

In Tankers

- | | | |
|----|----------------------|-------------|
| iv | Upto 250 Kilometers | 0.1 percent |
| v | Above 500 Kilometers | 0.2 percent |

Provided that there shall be no allowance of transit wastage on spirit received from a distillery to a warehouse situation within the premises of the same distillery or warehouses receiving liquor within warehouse premises by actual measurement. But where a tanker transport spirit from Distilleries for two or more warehouses, the transit loss shall be accounted for at the last warehouse on the total quantity which was transported

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from the distillery at a time in a single consignment:

Provided further that the Excise Commissioner may reduce the above scale for any warehouse.

(5).....

(6).....

Thus, it is clear that the percentage of the transit wastage has already been provided under Rule 6(4) of Distillery Rules, 1995.

Rule 8(4) of Distillery Rules, 1995 provides for penalty for transit wastage, which reads as under :

"Rule 8 Penalties

(1).....

(2).....

(3).....

(4) On all deficiencies in excess of the quantities allowed under rule 6, the distiller/supply contractor shall be liable to pay penalty at a rate not exceeding the duty payable per proof litre on country spirit at that time, which may be imposed by the Excise Commissioner or any other Excise Officer authorized by the Excise Commissioner. Provided that, if it be proved to the satisfaction of the Excise Commissioner or of such officer as he may authorise that such excess deficiency or wastage was due to some unavoidable cause, the Excise Commissioner or authorized officer may waive the penalty to be imposed under this provision.

(5)....."

It is the case of the Petitioner, that because the distance between the originating point and the destination was more than 2000 Kms. and because of bad conditions of road and leakage, the transit wastage was in excess of

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what has been prescribed under the Rule 6(4) of Distillery Rules, 1995, therefore, the imposition of the penalty is bad. It is further submitted that in fact, the Export duty was already charged by the State, therefore, no loss has been caused to the State and further it is the petitioner who had suffered loss because of transit wastage.

The question of levy of Penalty on all deficiencies in excess of the quantities allowed under Rule 6, has already been decided by this Court by judgment passed in the case of **Gwalior Distilleries Ltd. Vs. Collector (Excise)** reported in **2002(4) MPHT 12**, which reads as under :

"15.In fact, the respondent-State has only recovered and imposed penalty for the loss caused to it and for the purpose of assessing the penalty, the loss caused by way of excise duty has been quantified and there can be no illegality in doing so. The competent authorities empowered under the Statute, namely the Collector, the Commissioner and the Board of Revenue have also considered this aspect of the matter and have rejected the contention of the petitioner. The orders impugned are therefore, in accordance with law and interference in the same can be called for."

Thus, imposition of penalty for the transit wastage has already been upheld by this Court.

Under Rule 6(4) of Distillery Rules, 1995, the method of calculating the transit wastage has been provided. The petitioner has not challenged the validity of Maximum rate of transit wastage.

Thus, now the only question which remains to be decided is that whether the authorities were justified in

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imposing the penalty for the transit wastage or not?

Rule 8(4) of Distillery Rules, 1995, also gives power to the competent authority to waive the penalty, if the licensee succeeds in satisfying the competent authority, that the transit wastage was due to unavoidable circumstances.

In the present case, it is the defence of the petitioner, that the tanker was found to be in a sealed condition, and the seal was not found to be tampered, and the tanker was loaded in the presence of the Excise officials therefore, it cannot be said that the seal of the tanker was tampered or any theft was committed. Further, the bad conditions of roads of Madhya Pradesh are well known and because of bad conditions of roads as well as due to leakage, there was a transit wastage in excess of what has been prescribed under Rule 6(4) of Distillery Rules, 1995, therefore, the authorities should have waived the penalty.

Once, the maximum rate of transit wastage is provided under Rule 6(4) of Distillery Rules, 1995, then the burden is on the petitioner to prove, that the excessive transit wastage was due to the "unavoidable circumstances". "Unavoidable circumstances" mean beyond the control of the petitioner. In the present case, it is the case of the petitioner, that as the bad condition of the roads is well known, therefore, there was an excessive Transit wastage. The petitioner has not pointed out that at which place or between which places the conditions of roads were bad. No one can take judicial notice of the condition of roads. The petitioner was under obligation to at least give the details or should have disclosed the places,

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where the conditions of Roads were bad. Merely by making general and bald statement, with regard to the conditions of road, it cannot be said that the petitioner had discharged its burden to prove, that the excessive transit wastage has been caused due to the bad conditions of roads. Further, it was the case of the petitioner, that due to leakage also, there was excessive transit wastage. However, it was for the petitioner to ensure that there is no leakage. Further under Rule 6(4) of Distillery Rules, 1995, the maximum rate of transit wastage has been fixed in accordance with the distance between the originating point and destination. Thus, it cannot be said that as the distance between two places was more, therefore, there was more transit wastage. Thus, it is clear that the petitioner has failed to make out a case to show that the excessive transit wastage was caused due to "unavoidable circumstances". Under these circumstances, the authorities had no discretion to waive the imposition of penalty. Penalty under Rule 8(4) of Distillery Rules, 1995 has been provided for not adhering to the provisions of Distillery Rules, 1995.

The Supreme Court in the case of **State of Punjab Vs. Devans Modern Breweries Ltd.**, reported in (2004) **11 SCC 26** has held as under :

"139. In the case of *State of Haryana v. Lal Chand* this Court held that after making bid for grant of exclusive privilege of liquor vend with full knowledge of terms and conditions of auction, the bidder cannot wriggle out of the contractual obligations arising out of acceptance of his bid by filing writ petition.

140. In the case of *State of Punjab v. Dial Chand Gian Chand and Co.* this Court held

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that a licensee who participates in the auction voluntarily and with full knowledge is bound by the bargain and the writ petition filed under Article 226 by such licensee in an attempt to dictate terms of the licence without paying the licence fee must fail. The highest bidder after acceptance of his bid cannot challenge the second auction on the ground of adverse effect on his business."

Thus, it is clear that when the petitioner had participated in an auction and had obtained license to supply/transport rectified spirit, then he cannot avoid/bypass either the provisions regulating the trade in liquor or cannot avoid the terms and conditions of license or auction.

It is next contended by the Counsel for the Petitioner that as per the provisions of Rule 4 of Rules of Procedure of Board of Revenue, if a member wants to take a substantial departure from an earlier decision of a Member sitting single, he shall refer the proceeding pending before him to the President with recommendation that it be placed before the Division Bench. The Board of Revenue, on an earlier occasion, had set aside the order of the Excise Commissioner, and thus, the said order was binding on the Single Member of the Board of Revenue and in case, if the single member was intending to take a substantial departure, then he should have referred the matter to the President of the Board of Revenue with a recommendation to place the same before the Division Bench. It is submitted that on earlier occasions, the Board of Revenue had quashed the orders of the Excise Commissioner and since, those orders were binding on the Board of Revenue,

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therefore, the order passed by the Single member is bad.

Considered the submissions made by the Counsel for the Petitioner. The Board of Revenue might be governed by its Rules of Procedure, but the High Court, can always test the correctness of the reasons assigned by the Member, Board of Revenue. Thus, the High Court cannot be asked to interfere with the order of the Member of Board of Revenue only on the ground that since, the single member had not made a recommendation to the President of the Board of Revenue, for referring the matter to the Division Bench of the Board of Revenue, therefore, the order of Single Member, Board of Revenue is bad. Rule 4 of the Rules of procedure of Board of Revenue is meant to regulate the working of the Board of Revenue but the order of the Board of Revenue is not binding on the High Court, therefore, irrespective of the fact that whether the single member should have referred the matter to the Division Bench of the Board of Revenue or not, the High Court, can always test the correctness of the order of the Single Member of Board of Revenue. Further more, in the preset case, this Court in the case of **Gwalior Distilleries Ltd. (Supra)** has already held that the imposition of penalty for transit wastage, is in accordance with law. Hence, this contention of the Counsel for the Petitioner is rejected.

Thus, this Court is of the considered opinion, that as the petitioner has failed to make out any "unavoidable circumstance" for transit wastage in excess of what is prescribed under Rule 6(4) of Distillery Rules, 1995, therefore, the Dy. Commissioner, Flying Squad had no authority to waive the penalty. Thus, no illegality could be

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found in the orders of the Dy. Commissioner, Flying Squad, Division Indore, Excise Commissioner, State of Madhya Pradesh and Board of Revenue. Hence, this petition fails and is hereby **Dismissed**.

The interim order granted on earlier occasion is hereby **Vacated**.

(alok)

(G.S. Ahluwalia)
Judge