THE HIGH COURT OF MADHYA PRADESH

W.P.No.3853/2016

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

W.P.No.3873/2016

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

Gwalior, Dated : 30.11.2018

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

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

By this common order, W.P. No. 3853/2016 and W.P. No.3873/2016, 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 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. 3873 of 2016 shall be taken into consideration.

The Petitioner was granted C.S.-1B license for bottling of Country Liquor in Chorhata, District Rewa and accordingly, the petitioner was under obligation to submit the following certificates :

"1. Completion certificate of building and installation of Machinery
2. Permission certificates from Town and Country Planning Department, Local Body and M.P. Pollution Control Board.
3. No objection certificate as required from any other department
4. Counter part agreement executed on stamp paper of Rs. 250/-."

Although the petitioner submitted the counter part agreement, executed on stamp paper of Rs. 250/- but did not produce the remaining certificates. In anticipation of the said certificates, the license was issued to the petitioner. Accordingly, a show cause notice was issued to the petitioner on 3-12-2012.

The petitioner submitted its reply and pleaded that all the formalities have been completed and the petitioner has not violated any term or condition of the contract or tender

or Rule.

The reply submitted by the Petitioner was not found to be satisfactory. Although the Petitioner had submitted the counter part agreement within time, but the N.O.C. issued by Town and Country Planning Department and the N.O.C./certificate issued by the M.P. Pollution Board were submitted belatedly. Thus, for violation of Rule 3-B(10) of M.P. Country Spirit Rules, 1955, (In short Spirit Rules, 1995) the Excise Commissioner by order dated 14-11-2013, imposed a penalty for the delay of 292 days.

Being aggrieved by the order of the Excise Commissioner, the Petitioner filed an appeal before the Board of Revenue, which has been dismissed by order dated 16-2-2016.

Challenging the impugned orders, it is submitted by the Counsel for the petitioner, that the penalty can be imposed only in case any loss is caused and since, no loss was caused to the State Govt, therefore, the imposition of penalty is bad in law. To buttress his contentions, the counsel for the petitioner has relied upon the judgments passed by the Supreme Court in the case of **Union of India Vs. Rampur Distillery** reported in **AIR 1973 SC 1098.** It is further submitted that earlier in another case, the Board of Revenue had passed an order in favor of the licensee and since, the single member of the Board of Revenue has made a substantial departure from the earlier orders of the Board of Revenue, therefore, he should have recommended to the President, Board of Revenue for referring the matter to the Division Bench.

Per contra, it is submitted by the Counsel for the

State that the petitioner has no Fundamental Right to carry on trade in liquor as it is a privilege transferred by the State. Without challenging the validity of Rule 3-B(10) of Spirit Rules, 1995, the Petitioner cannot challenge the imposition of Penalty, because in the present case, the penalty is not imposed for any loss caused to the State Govt., but it is imposed for breach or contravention of the provisions of Rules.

Heard the learned Counsel for the parties.

Rule 3-B(10) of Spirit Rules, 1995 reads as under :

> **"3. Grant of Licence for Bottling of Country Spirit :**
>
> **3-B(10).** The applicant shall report to the Excise Commissioner, the date on which the construction of the building and erection of the plant and machinery are completed, along with certificates or authorizations or clearances required from local body. Town and Country Planing Department, Madhya Pradesh Pollution Control Board and any other Department of the State Government, under any enactment or rules in force."

It is well established principle of law that trade in liquor is merely a privilege and not a fundamental right. The Supreme Court in the case of **State of Punjab Vs. Devans Modern Breweries Limited,** reported in **(2004) 11 SCC 26** has held as under :

> **"113.** In my opinion, Articles 301 and 304(*a*) of the Constitution are not attracted to the present case as the imposition of import fee does not, in any way, restrict trade, commerce and intercourse among the States. In my opinion, the permissive privilege to deal in liquor is not a "right" at all. The levy

> charged for parting with that privilege is neither a tax nor a fee. It is simply a levy for the act of granting permission or for the exercise of power to part with the privilege. In this context, we can usefully refer to *Har Shankar* v. *Dy. Excise and Taxation Commr.* and *Panna Lal* v. *State of Rajasthan*. As noticed earlier, dealing in liquor is neither a right nor is the levy a tax or a fee. Articles 301-304 will be rendered inapplicable at the threshold to the activity in question. Further, there is not even a single judgment which upholds the applicability of Articles 301-304 to the liquor trade. On the contrary, numerous judgments expressly hold these articles to be inapplicable to trade, commerce and intercourse in liquor. We can beneficially refer to the judgments in *State of Bombay* v. *R.M.D. Chamarbaugwala*, *Har Shankar case*, *Sat Pal and Co.* v. *Lt. Governor of Delhi* and *Khoday case*. The learned counsel for the respondent submitted that Articles 301-304 are violated or transgressed. In view of discussions in the paragraphs above, it is clearly demonstrated as to how and why Articles 301-304 are inapplicable to liquor trade in any form."

The Supreme Court in the case of **Synthetics and Chemicals Ltd. Vs. State of U.P.** reported in **(1990) 1 SCC 109** has held as under :

> **"105.** The basis of the privilege doctrine appears to be that alcoholic drinks or intoxicating drinks are expected to be injurious to health and therefore the trade in these commodities is described as obnoxious and therefore a citizen has no fundamental right under Article 19(1)(*g*) of the Constitution and therefore the trade in alcoholic drinks which is expected to be injurious to health and obnoxious is the privilege of the State alone and the

> State can part with this privilege on receipt of the consideration."

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 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 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 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.
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> (*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.
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> (*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 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."

The Supreme Court in the case of **State of Kerala Vs. Kandath Distilleries** reported in **(2013) 6 SCC 573** has held as under :

> "24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no

> fundamental right to trade or business in liquor as a beverage and the activities, which are res extra commercium, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are res commercium. Reference may be made to the judgments of this Court in *Vithal Dattatraya Kulkarni* v. *Shamrao Tukaram Power*, *P.N. Kaushal* v. *Union of India*, *Krishan Kumar Narula* v. *State of J&K*, *Nashirwar* v. *State of M.P.*, *State of A.P.* v. *McDowell & Co.* and *Khoday Distilleries Ltd.* v. *State of Karnataka*."

Thus, it is clear that when there are the provisions of law governing and regulating the business of liquor and when the petitioner has applied for grant of license as per the terms of auction, then the petitioner cannot wriggle out of the contractual obligations.

The Supreme Court in the case of **State of Haryana v. Lal Chand,** reported **(1984) 3 SCC 634,** in has held as under :

> **"8.** In *Har Shanker* v. *Deputy Excise and Taxation Commissioner* this Court held that the writ jurisdiction of the High Courts under Article 226 was not intended to facilitate avoidance of obligations voluntarily incurred. It was observed that one of the important purposes of selling the exclusive right to vend liquor in wholesale or retail is to raise revenue. The

licence fee was a price for acquiring such privilege. One who makes a bid for the grant of such privilege with a full knowledge of the terms and conditions attaching to the auction cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of his bid. Chandrachud, J. (as he then was) interpreting the provisions of the Punjab Excise Act, 1914 andof the Punjab Liquor Licence Rules, 1956 said: (SCC pp. 745-46, para 16)

"The announcement of conditions governing the auctions was in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by the prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. . . . The powers of the Financial Commissioner to grant liquor licences by auction and to collect licence fees through the medium of auctions cannot by writ petitions be questioned by those who, had their venture succeeded, would have relied upon those very powers to found a legal claim. Reciprocal rights and obligations arising out of contract do not depend for their enforceability upon whether a contracting party finds it prudent to abide by the terms of the contract. By such a test no contract could ever have a binding force."

To the same effect are the decisions of this Court in *State of Haryana* v. *Jage Ram* and the *State of Punjab* v. *Dial Chand Gian Chand & Co.* laying down that persons who offer their bids at an auction to vend country liquor with full knowledge of the

> terms and conditions attaching thereto, cannot be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids by a petition under Article 226 of the Constitution."

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.
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> **140.** In the case of *State of Punjab* v. *Dial Chand Gian Chand and Co.* this Court held 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 for setting up bottling unit, then neither he can avoid any provisions regulating the trade in liquor nor can avoid any term(s) and condition(s) of license or auction.

In the present case, it is the case of the petitioner, that since, the State had not suffered any financial loss, therefore, even in the case of violation of provisions of Rule 3-B(10) of Spirit Rules, 1995, no penalty can be recovered.

Penalty is provided under Rule 12 of Spirit Rules, 1995

which reads as under :

> **"12. Penalties : (1)** Without prejudice to the provision of the conditions of the C.S.1 licence and save where provisions is expressly made for any other penalty in these rules, the Excise Commissioner may impose upon C.S. 1 licensee a penalty not exceeding Rs. 2,00,000 for any breach or contravention of any of these rules or the provisions of Madhya Pradesh Excise Act, 1915 or rules made thereunder or orders of the Excise Commissioner and may further impose in the case of continued contravention an additional penalty not exceeding Rs. 1,00,000 for every day during with the breach or contravention is continued.
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> **(2)** Deleted
>
> **(3)** Deleted
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> **(4)** In the event of failure to dispatch the spirit requisitioned under rule 5(4)(d), the D-1 or C.S. 1 licensee shall be liable to such penalty not exceeding RS. 2/- per proof litre impossible by the Excise Commissioner on the quantity of spirit thus short supplied.
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> **(5)** The Excise Commissioner may suspend or cancel the licence under Section 31 of the Act and may also black list the licensee upon a breach or contravention of any of these rules or of the provisions of Act or of the rules made thereunder. The licensee shall be liable for any loss caused to Government as a result of suspension or cancellation.
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> **(6)** On all losses in excess of the limits allowed under rule 10, the licensee shall be liable to pay penalty at a rate not exceeding the duty payable per proof litre on country spirit at that time, as may be imposed by the Excise Commissioner or any officer authorised by him:
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> Provided that if it be proved to the

> satisfaction of the Excise Commissioner or the authorized officer that such excess deficiency or loss was due to some unavoidable causes like or accident and its first information report was lodged in concerned police station, he may waive the penalty imposable under this sub-rule."

From the plain reading of Rule 12 of Spirit Rules, 1995, it is crystal clear that the penalty is imposable on breach or contravention of any of these rules or the provisions of M.P. Excise Act. Thus, it is clear that penalty under Rule 12 of Spirit Rules, 1995 is not imposed for the loss sustained by the State.

The Supreme Court in the case of **R.S. Joshi etc. Vs. Ajit Mills and another** reported in **AIR 1977 SC 2279** has held as under :

> **"19**. The same connotation has been imparted by our Court too. A Bench has held:*
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> "According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture."
>
> This word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction. The fact that there is arithmetical identity, assuming it to be so, between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a

transference of funds. If this view be correct, and we hold so, the legislature, by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers. The Criminal Procedure Code, Customs and Excise Laws and several other penal statutes in India have used diction which accets forfeiture as a kind of penalty. When discussing the rulings of this Court we will explore whether this true nature of 'forfeiture' is contradicted by anything we can find in S. 37 (1), 46 or 63. Even here we may reject the notion that a penalty or a punishment cannot be cast in the form of an absolute or no fault liability but must be preceded by mens rea. The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37 (1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty.

* Bankura Municipality v. Lalji Raja and Sons : AIR 1953 SC 248, 250.

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58. The controversy therefore centres mainly on the question whether the provision as to the forfeiture in the impugned section is a penalty or whether it is merely a device to collect the amount unauthorisedly realised by the dealer. The plea of a device or colourable legislation would be irrelevant if the legislature is competent to enact a particular law. The question is one of competence of a particular legislature to enact a particular

> law. If the legislature is competent to pass a particular law the motive which impelled it to act is not relevant. After the decision in Abdul Quader's case (AIR 1964 SC 922) where it was pointed out that it was competent for the legislature to provide penalties for the contravention of the provisions of the Act for its better enforcement, the provision in an enactment levying such a penalty cannot be challenged.
> * * * * *
> **61**. Mr. Kaji next submitted that forfeiture if it is to be penalty would be confined to acts where there is a guilty mind. In other words he submitted that the penalty would be confined only to wilful acts of omission and commission in contravention of the provisions of the enactment. This plea cannot be accepted as penal consequence can be visited on acts which are committed with or without a guilty mind. For proper enforcement of various provisions of law it is common knowledge that absolute liability is imposed and acts without mens rea are made punishable."

As it is evident from Rule 12 of Spirit Rules, 1995, that the penalty is imposed for contravention or breach of any of the Rule and not by way of punishment for committing any offence, therefore, mens rea or actual loss to the other party of the contract are not necessary. Where a provision, which is in public interest, has been made, then for its better enforcement, if the penalty is provided, then it is within the legislative competence and mens rea is not necessary. Mere contravention or Breach of any of the Rule is sufficient to invite the imposition of Penalty. As already held that the petitioner has not denied the violation of Rule 3-B(10) of Spirit Rules, 1995. Thus, where contravention

or breach of any rule has been established, then the authorities are well within their right to impose the penalty for such contravention or breach.

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, 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.

In the present case, the petitioner has not disputed that the clearance required from different departments were not submitted in time and thus, Rule 3-B(10) of Spirit Rules, 1995 was violated.

Accordingly, this Court is of the considered opinion that, no fault can be found with the impugned orders dated 14-3-2014 passed by the Excise Commissioner and order dated 19-9-2014 passed by the Board of Revenue and accordingly, they are affirmed.

The petition is thus **dismissed** being misconceived and devoid of merits.

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

(G.S. Ahluwalia)
Judge

(alok)