

PETITIONER:
MOHAN MEAKIN BREWERIES LTD.

Vs.

RESPONDENT:
COMMISSIONER OF EXCISE, BIHAR & ORS.

DATE OF JUDGMENT 15/04/1986

BENCH:
OZA, G.L. (J)
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OZA, G.L. (J)
MISRA, R.B. (J)

CITATION:
1986 AIR 1522 1986 SCR (2) 547
1986 SCC (3) 430 1986 SCALE (1) 613

ACT:
Bihar and Orissa Excise Act, 1915 - Sections 27 & 28
Difference of duty resulting from any increase in the rates
of duty subsequent to import - Realisation of from importing
or transporting licences - Whether valid and permissible. C

HEADNOTE:

Rate of duty on Indian made foreign liquor was enhanced by Notification dated October 13, 1967 effective from November 1, 1967. Consequently the Superintendent of Excise directed the petitioner-company to pay the difference of duty on the balance of stock as on November 1, 1967. That demand order was challenged by the petitioner under Art. 32. This Court in Mohan Meakin Breweries Ltd. v. Commissioner of Excise, Bihar Ors. [1969] 2 S.C.R. 457, held that in view of Arts. 27 and 28 of the Bihar & Orissa Excise Act 1915, and also in view of rule 147 framed by the Board of Revenue, such an order for recovery of the difference of duty cannot be passed and, therefore, the demand was quashed. After this decision, an ordinance amending the Act was issued by the Governor of Bihar. It added a proviso to Art. 28 of the Act. Pursuant to this amendment, a fresh notice of demand was issued by the Assistant Excise Commissioner for recovery of difference of duty on the stocks as on 1.11.67 which was earlier demanded and quashed by this Court.

The petitioner again filed a petition under Article 32 challenging the fresh demand contending: (i) that in the scheme of the Act, Art. 27 is the charging section and Art. 28 provides for procedure. Under section 27(a) the duty is leviable on the import of excisable goods, and duty to be levied will be according to the rate in force on the date the goods are imported in the State of Bihar; (ii) that the incident of duty not having been amended by mere addition of a proviso to Art. 28 the levy of additional duty according to the revised rate could not be charged; (iii) that the Act does not H

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authorise the Executive under the delegated function by issuance of a Notification to revise the rates retrospectively; (iv) that in the State of Bihar, there was no manufacture of Indian made foreign liquor and thus in view of Articles 301, 303 and 304 of the Constitution, there

is no justification for imposing or enhancing the excise duty on import of Indian made liquor in the State of Bihar; and (v) that in view of the scheme of the said Articles of the Constitution, the duty which could be imposed on Indian made foreign liquor imported in the State of Bihar could only be justified as a countervailing duty but as no Indian made foreign liquor was manufactured in the State of Bihar, such a duty was not justified, and in any event, the notification enhancing the rate of duty is bad being unconstitutional.

On behalf of the respondents-State, it was contended that there are manufacturers of Indian made foreign liquor in Bihar itself, that they have been manufacturing and selling Indian made foreign liquors and it could not be contended that there was no local manufacturer of Indian made foreign liquor in the State of Bihar during the period to which the present dispute relates.

Dismissing the petition,

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HELD: 1. Sections 27 and 28 of the Bihar & Orissa Excise Act, 1915 put together provide for the scheme of levy of excise duty and it could not be said that the two sections are in two separate water tight compartments. [557 D]

2. Under s. 27 when an excisable article is imported, this section provides an excise duty or countervailing duty at rate or rates that the State Govt. may direct could be imposed. By the proviso which has now been added to 8. 28, it has been provided that when any excisable article is imported or transported on payment of duty according to the provisions of sub-cl. (1) of cl. (a) or cl. (c) the difference of the duty resulting from any provision of the rates of duty subsequent to such import shall be realised or credited to the importing or transporting licence. This provides for a situation where after import or transport the rates is revised either enhanced or reduced still that can be adjusted on the basis of the stock in existence on the day when the rate is

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revised and this is what specifically was held in Mohan Meakin Breweries Ltd. case (supra). [557 D-G]

3. The Proviso of Rule 147 practically is same as now has been added to 8. 28 and under this Rule the difference of duty could only be charged if it is imported on a bond. This rule could not be of any help in case where the excisable articles are imported after the payment of duty and it is this which has now been specifically provided in the Explanation added to 8. 28. [558 G-H; 559 A]

JUDGMENT:

ORIGINAL JURISDICTION : Writ Petition No. 451 of 1971.

Under Article 32 of the Constitution of India. C

G.L. Sanghi, S.K. Mehta and M.K. Dua for the Petitioner.

D. Goburdhan and R. Goburdhan for the Respondents.

The Judgment of the Court was delivered by D

OZA, J. This petition under Art. 32 of the Constitution has been filed by the petitioner challenging a notice of demand Annexure 'C' dated 22nd September, 1971 calling upon the petitioner to pay the difference of duty on the balance of stock on 1st November, 1967 of the Indian made foreign liquor imported in the State of Bihar. This notice was based on an amendment in Section 28 of the Bihar And Orissa Excise

Act, 1915 ('Act' for short) brought about by an Ordinance promulgated by the Governor of Bihar dated 21st August, 1971.

In fact earlier the rate of duty was enhanced by Notification dated October 13, 1967 and it was with effect from November 1, 1967. The Superintendent of Excise, Patna directed the petitioner Company to pay the difference of duty on the pending balance of Indian made foreign liquor in its stock on November 1, 1967 and that order of the Superintendent Excise was challenged by the petitioner Company in a petition under Art. 32 of the Constitution and by the decision of this Court in *Mohan Meakin Breweries Ltd. v. Commissioner of Excise, Bihar & Ors.*, [1969] 2 S.C.R. 457 it was held that in view of the Sections 27 and 28 of the Act and also in view of Rule 147 framed by the Board of Revenue, such an order for H 550

recovery of the difference of duty cannot be passed and therefore the demand was quashed. After this decision which was pronounced on October 17, 1968 it appears that the Governor of State of Bihar issued an ordinance amending the Bihar And Orissa Excise Act, 1915 which was published in the Gazette on 23rd August, 1971. By this Ordinance, a proviso was added to Section 28 of the Act, after the first proviso and it reads :

"Provided further that in case of excisable articles imported or transported on payment of duty according to the provisions of sub clause (1) of clause (a) or clause (c) of this section, the difference of duty resulting from any provision in the rates of duty subsequent to such import shall be realised from or credited to the account of the importing or transporting licences according to the revised rate of duty which may be higher or lower than the previous rate and the calculation thereof shall be made on the balance stock of excisable article on the date the revised rate of duty comes into effect".

And it is in pursuance of this amendment that a fresh notice of demand was issued to the petitioner by the Assistant Excise Commissioner, Patna for the recovery of difference of duty on the stocks on 1.11.67 which was earlier demanded and which was quashed by the decision in *Mohan Mbakin Breweries Ltd.* case and by the present writ petition this demand has again been challenged.

Two contentions have been raised by the learned counsel for the petitioner.

That in the scheme of the Act Section 27 is the charging section and Section 28 is only a section which provides for the procedure. Under Section 27(a) the duty is leviable on the import of excisable articles and, therefore, the incident of levy is the fact of import of the excisable goods. The duty which could be levied will be according to the rate in force on the date the goods are imported in the State of Bihar. It is not disputed that the stocks in hand on 1.11.67 are goods which have been imported after the payment of duty as

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required in clause (a) of section 27. It was, therefore, A contended that as in the scheme of Section 27 the incident of duty is the import of excisable goods and that not having been amended by mere addition of a proviso to Section 28 the levy of additional duty according to the revised rate could not be charged as the charging event under the scheme of Section 27 is the import of excisable goods. It was also

contended that there is no provision in the Act which authorises the Executive under the delegated function by issuance of a Notification to revise the rates retrospectively. Therefore, the rate if revised could be enforced for charging of duty on the excisable goods which are imported after the rate is revised as there is no amendment to Section 27 which is the charging section. C

The second contention advanced by the learned counsel for the petitioner was that in the State of Bihar there was no manufacture of Indian made foreign liquor and thus in view of Articles 301, 303 and 304 of the Constitution of India, there is no justification for imposing or enhancing the excise duty on import of Indian made foreign liquor in the State of Bihar. As it was contended that in view of the scheme of the above mentioned articles of the Constitution, the duty which could only be justified as a countervailing duty but as no Indian made foreign liquor was manufactured in the State of Bihar such a duty was not justified and in any event the notification enhancing the rate of the duty, therefore, is bad being unconstitutional and in support of this contention, learned counsel placed reliance on the decision in *Kalyani Stores v. The State of Orissa and others*, [1966] 1 S.C.R. 865. No other question was raised.

Learned counsel appearing for the respondents State of Bihar, as regards the second contention, contended that in the counter-affidavit filed by the respondent State it has been clearly stated that there are manufacturers of Indian made foreign liquor in Bihar itself. In that counter, the dates of licences issued to such manufacturers have been stated and it has also been stated that they have been manufacturing and selling Indian liquors like Brandy, Rum, Whisky and others and after this counter, as the petitioner had not filed any fresh affidavit challenging this statement of fact made by the State of Bihar, it could not be contended that there was

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no local manufacture of Indian made foreign liquor in the State of Bihar during the period about which the present dispute relates. And it was not disputed that this contention about the validity of duty as a countervailing duty could only be raised if on facts it is found that there was no local manufacture of Indian made foreign liquor in the State of Bihar. As the decision in *Kalyani Stores' case* (supra) is based on a situation where there was no manufacture of Indian made foreign liquor in the State of Bihar as this case pertains to the State of Bihar itself. It is also not disputed that when the same demand before the amendment of the Act by an Ordinance was challenged by the petitioner before this Court and it was quashed by the decision of this Court in *Mohan Meakin Breweries Ltd. case* (supra). this question of the validity of the duty in the light of Articles 301, 303 and 304 was not raised before this Court and it was, therefore, contended by learned counsel appearing for the State of Bihar that this contention was not raised probably because it could not be contended that during the relevant period there was no manufacture of Indian made foreign liquor within the State of Bihar.

It would be, therefore, necessary to find out as to whether it could be held that during the relevant period there was no manufacture of Indian made foreign liquor in the State of Bihar. In paragraphs 28 and 29 of the petition it has been specifically alleged by the petitioners that no foreign liquor similar to those manufactured and produced by the petitioner were manufactured and produced by the

petitioner were manufactured and produced in the State of Bihar. In Paragraph 9 of the Counter-affidavit, it has been clearly stated :

"mat with regard to the statements in paragraphs 28 and 30, I deny that no foreign liquor similar to those manufactured, produced and imported by the petitioner are manufactured and produced in the State of Bihar. me fact is that foreign liquor similar to those manufactured produced and imported by the petitioner company are manufactured and produced in the State of Bihar by some other licences. Messers. S. K. Shaw, Patna, which hold licence since 1942 to manufacture foreign liquor have been producing or manufacturing foreign liquor

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Of various varities, namely, Rum, Brandy, Whisky, A Gin, etc. since then Messers Lakshminarain and Sons of Ranchi Distillery also hold licence since 1943-44 to manufacture and produce foreign liquor and are producing and manufacturing foreign liquor. Similarly, Messers S.K.G. Sugar Ltd., Mirganj, have been granted licence to manufacture foreign liquor and they are producing them in the State".

This is clearly shown in the counter-affidavit filed by the i State. This allegation by the petitioner that similar Indian made foreign liquor was not manufactured in the State of Bihar during the relevant time is not only specifically denied but particulars about such manufacture and sale have been clearly stated. An attempt was made by learned counsel for the petitioner to suggest that the documents filed along with this counter do not fully establish what has been stated in this counter-affidavit filed on behalf of the State. me counter-affidavit filed on behalf of the State quoted above in clear and categorical terms denied the allegation made by the petitioner and, therefore, it is not even necessary to look to the documents in support of it unless this statement made in the counter-affidavit filed on behalf of the State is challenged by way of a rejoinder affidavit on behalf of the petitioner. In the counter the names of the licencees who have been given licences for manufacture and the year of licences, and all details have been stated and it was open to the petitioner if there was any need, to challenge this statement made in the counter-affidavit filed on behalf of the State. In this view of the matter, therefore, on the facts as they stand, the contention of the learned counsel for the petitioner that during the relevant period similar Indian made foreign liquor was not manufactured by any other manufacturer in the State of Bihar could not be accepted. It was frankly conceded that the second contention based on the provisions contained in Articles 301, 303 and 304 of the Constitution of India is based on a finding that there was no manufacture of similar excisable goods within the State of Bihar and the Judgment on which reliance is placed i.e. Kalyani Stores' case ! (supra) also will have no application if on facts it is found that during the relevant period similar Indian made foreign liquor was manufactured and sold by manufacturers within the State of Bihar itself.

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Thus we are left with the only other contention which pertains to Section 27 and 28 of the Act which reads thus :

"27. Power to impose duty on import, export, transport and manufacture - (1) An excise duty or

a countervailing duty, as the case may be, at such rate or rates as the State Government may direct, may be imposed, either generally or for any specified local area, on -

- a) any excisable article imported, or
- b) any excisable article exported, or
- c) any excisable article transported, or
- d) any excisable article (other than tari) manufactured under any licence granted in respect of clause (a) of Section 13, or
- e) any hemp plant cultivated, or any portion of such plant collected, under any licence granted in respect of clause (b) or clause (c) of Section 13 or
- f) any excisable article manufactured in any distillery or brewery licensed, established, authorised, or continued under this Act.

Explanation- Duty may be imposed on any article under this sub-section at different rates according to the places to which such article is to be removed for consumption, or according to the varying strengths and quality of such article.

(2) A duty, at such rate or rates as the State Government may direct, may be imposed either generally or for any specified local area, on any tari drawn under any licence granted under Section 14, sub-section (1) :

(3) Notwithstanding anything contained in sub-section (1) -

(i) duty shall not be imposed hereunder on any article which has been imported into India and was

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liable on such importation, to duty under the Indian Tariff Act, 1894 or the Sea Customs Act, 1878, if-

- a) the duty as aforesaid has been already paid
- b) a bond has been executed for the payment of such duty. B

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28. Ways of levying duty- Subject to any rules made under Section 90, clause (12), any duty imposed under Section 27 may be levied in any of the following ways

(a) on an excisable article imported -

i) by payment (upon or before importation) in the State or in the State or territory from which the article is brought, or D

ii) by payment upon issue for sale from a ware-house established, authorised or continued under this Act;

(b) on an excisable article exported - E

by payment in the State or in the State or territory to which the article is sent;

(c) on an excisable article transported-

i) by payment in the district from which the article is sent, or

ii) by payment upon issue for sale from a ware-house established, authorized or continued under this Act: G

d) on intoxicating drugs manufactured, cultivated or collected-

i) by a rate charged upon the quantity manufactured under a licence granted in respect of H

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the provisions of Section 13, clause (a) or issued A for sale from a ware-house established, authorized or continued under this Act, or

ii) by a rate assessed on the area covered by, or on the quantity or outturn of, the crop cultivated

or collected under a licence granted in respect of the provisions of Section 13, clause (b) or clause (c);

(e) on spirit or beer manufactured in any distillery or brewery licensed, established, authorised or continued under this Act, -

(i) by a rate charged upon the quantity produced in or issued from the distillery or brewery, as the case may be, or issued for sale from a warehouse established, authorised or continued under this Act, or

(ii) in accordance with such sale, of equivalents, calculated on the quantity of materials used, or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe, and

(f) on tari drawn under a licence granted under Section 14, sub-section (1)- by a tax on each tree from which the drawing of tari is permitted;

Provided that, where payment is made upon the issue of an excisable article for sale from a warehouse, it shall be at the rate of duty in force on the date of issue of such article from such warehouse;

Provided also that no tax shall be levied in respect of any tree from which tari is drawn only for the manufacture of gur or molasses and under such special conditions as the Board may prescribe".

By an ordinance referred to above, a proviso was added to Section 28, which reads as under :

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"Provided further that in case of excisable A articles imported or transported on payment of duty according to the provisions of sub-clause (1) of Clause (a) or Clause (c) of this Section, the difference of duty resulting from any provision in the rates of duty subsequent to such import shall be realised from or credited to the account of the importing or transporting licencees according to the revised rate of duty which may be higher or lower than the previous rate and the calculation thereof shall be made on the balance stock of excisable article on the date the revised rate of duty comes into effect".

According to the learned counsel for the petitioner in the scheme of these two sections, Sec. 27 is the charging section and Section 28 provides for procedure. A careful scrutiny of the two sections indicates that the two sections put together provide for the scheme of levy of excise duty and it could not be said that the two sections are in two separate water-tight compartments. Under Section 27 when an excisable article is imported, this section provides an excise duty or countervailing duty at rate or rates that the State Government may direct could be imposed. By the proviso which has now been added to Section 28 it has been provided that when any excisable article is imported or transported on payment of duty according to the provisions of sub-clause (i) of Clause (a) or Clause (c) the difference of the duty resulting from any provision of the rates of duty subsequent to such import shall be realised or credited to the importing or transporting licensee. This, therefore, provides for a situation where after import or transport the rate is revised either enhanced or reduced still that can be adjusted on the basis of the stock in existence on the day when the rate is revised and this is what specifically was held in Mohan Meakin Breweries Ltd. case (supra) as their

Lordships observed:

"The main part of Rule 147 applies to foreign liquor imported under bond which, as already stated, is kept in an excise ware-house established under the Act. It provides that duty imposed on foreign liquor imported under bond shall be paid before removal from the excise ware-house unless a

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bond has been executed for such payment. Under the proviso to Rule 147 in case of any revision of the rate of duty on an excisable article, the licensee to whom the article has been issued on payment of duty prior to such revision is liable to pay the difference of duty on the quantity of such article that may remain in his possession when the revised rate of duty comes into force. The proviso must be construed with reference to the main part of the Rule. A close scrutiny of the Rule reveals that the main part and the proviso deal with the same subject-matter. The expression 'an excisable article' in the proviso means foreign liquor imported under bond and other articles on which duty is payable before removal from the excise ware-house or distillery where they are kept. It is for this reason that under the proviso the difference of duty is realised from or credited to the licensee to whom the article has been issued from the excise ware-house or distillery on payment of duty prior to such revision. The proviso does not apply to all imported foreign liquor. It applies only to foreign liquor imported under bond, that is to say foreign liquor on which duty has been levied under Section 28(a)(ii) by payment upon issue for sale from an excise ware-house. It does not apply to foreign liquor not imported under bond upon which duty has been levied under Section 28(a)(i). The petitioner is not, therefore, liable to pay under the proviso to Rule 147 the difference of duty in respect of its stock of foreign liquor on November 1, 1947. The demand for payment of the difference of duty in respect of this stock is not authorised by the Act or the proviso to Rule 147".

The proviso to Rule 147 which was considered by their Lordships in this case no doubt practically is same as now has been added to Section 28 and their Lordships rejected the contention of the State on the ground that under this Rule the difference of duty could only be charged if it is imported on a bond as provided in the earlier part of the rule on which duty has not been charged and, therefore, it was held that this rule could not be of any help in case re the

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excisable articles are imported after the payment of duty and A it is this which has now been specifically provided in the explanation added to Section 28.

As discussed earlier, the contention that this amendment to Section 28 could not be deemed to be an amendment to the charging section as according to the learned counsel, Section 27 alone is the charging section. As discussed earlier such a distinction between these two sections can hardly be drawn. Apart from it, it is not contended that the Legislature was not competent to enact such an amendment in the statute. In this view of the matter

this contention also cannot be accepted. No other ground was urged.

In the light of the discussions above, we see no substance in this petition. It is, therefore, dismissed in the circumstances of the case. Parties are directed to bear their own costs. If any security is deposited it shall be refunded to the petitioner.

A.P.J.

Petition dismissed.

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