

Amol
Diliprao
Nawale

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT Petition NO. 2211 OF 2005

M/s. Bombay Distributors

a Proprietary firm having their business
place and office at Batliwala Compound,
Near Bail Bazar, Kale Marg, Kurla,
Mumbai-400 070

..Petitioner

Vs.

1. The State of Maharashtra
through the Principal Secretary, Home
(State Excise) Department, Mantralaya,
Mumbai-400 032.

2. Commissioner of State Excise
Maharashtra State, Old Custom House,
Mumbai-400 023

3. The Collector of Mumbai
Suburban District,
(State Excise Department),
Old Custom House,
Mumbai-40023

..Respondents

Mr. D. B. Savant a/w. Ms. Amrita Singh for the Petitioner.

Mr. Himanshu Takke, AGP for the Respondent Nos. 1 to 3.

CORAM:- G. S. KULKARNI &
RAJESH S. PATILJJ.

RESERVED ON 9th JUNE 2023
PRONOUNCED ON 4th AUGUST 2023

JUDGMENT [PER: RAJESH S. PATIL, J.]:

1. This Writ Petition is filed under Article 226 of the Constitution of India praying for a relief, which reads as under :-

(a) this Hon'ble Court be pleased to issue a writ of Mandamus, or any other appropriate writ orders or directions calling for papers and proceedings in respect of Petitioners file with the Respondents pertaining to posting of the excise supervisory staff u/s 58A of the Bombay Prohibition Act and after scrutinizing the validity and legality thereof the Respondents be directed to pay a sum of Rs.1,05,533/- to the Petitioners being recovered in excess.

2. By an order dated 26th September, 2006, 'Rule' was issued on the present Writ Petition.

3. The petition is espoused on the grounds that Respondents ought to have recovered the supervision charges or cost in accordance with the circulars dated 19 November, 1981 and 11 March, 1993, which direct to recover the proportionate charges. Further, the cost of supervision means the actual cost incurred by the Respondents and not the sanctioned post, and only one officer and one constable were looking after the charge of several establishments when they were recovering full charges from each establishment.

4. Mr. D. B. Savant, the learned counsel for the Petitioner submitted that The Bombay Prohibition Act, 1949 (*for short “the said Act”*) provides for grant of various licenses for manufacture, sale, and possession of the various intoxicants mentioned in the said Act. Under the provisions of the said Act, various rules are framed in exercise of powers conferred under Section 143 of the said Act, for the purpose of carrying out the provisions of the said Act.

4.1 Mr. Savant further submitted that for the purpose of carrying out the provisions of the said Act, the State Government framed rules, namely The Bombay Foreign Liquor Rules, 1953 (in short “the said Rules”). In order to control the manufacture, sale, transport, import and export of intoxicant, the State has powers to post Excise Supervision and carry out the functions under the strict control. Section 58 A of the said Act, provides for appointment of supervision staff over manufacture etc. Under the said Rules, the license of sale for foreign liquor by wholesale is granted under Rule No.5. The Petitioner applied to Respondent No.3 for license, in Form F.L.-I. The Respondent No.3 accordingly, granted the license to the Petitioner in Form F.L.-I.

4.2 Rule 17 of the Bombay Foreign Liquor Rules, 1953 provides that the Respondent No.3 has power to appoint excise staff upon the licensed premises as he may deem necessary. Under license condition No.13, the Petitioner is required to pay in advance for each quarter the cost of staff appointed at the license premises.

4.3 Accordingly, considering the nature of business carried out by the Petitioner, one Sub-Inspector and one Constable was sanctioned from September, 1998. It is the Petitioner case that in fact from September, 1998 till March, 2000, the appointed Sub-Inspector was looking after two establishments, one of which was the Petitioner's establishment. Thus, according to the Petitioner, they were liable only to pay half of the charges towards cost of excise supervision. Hence, excess amount was paid by the Petitioner being an amount of Rs.1,12,905/-, when actually what was payable was Rs.56,452.50/-. So also from September, 1998 till November, 1999 the Petitioners paid the charges equivalent to salary of one constable. However, the said constable was looking after supervision of two FL-I licenses similar to the Sub-Inspector. During that period the Petitioners were liable to pay of Rs.28,425/- towards the cost of constable whereas the Petitioner actually paid

Rs.56,850/- From December, 1999 till March, 2000, the said appointed constable was looking after four FL-I licenses, and from April to June, 2000, the said constable was looking after five establishments. Therefore, The Petitioner had paid amount in excess than what was actually liable to be paid.

4.4 Mr. Savant has submitted that on the above premise the Petitioner by its letter dated 13th May, 2000 and 8th December, 2000, addressed to the Superintendent of State Excise, requested for refund of the excess amount paid. The Petitioner also emphasized on internal communication of the Superintendent of State Excise written to the Officer-in-Charge, being letter dated 10th January, 2001, that a detailed report be submitted in this regard.

4.5 Petitioner, thereafter by letter dated 20th March, 2004 and 20th September, 2004, of its advocates, called upon the Respondent No.2 to refund the said excess amount paid. However there was no reply to these letters written by the Petitioner's Advocate.

4.6 Petitioner also referred to a Circular of Respondent No.2 dated 11th March, 1993 and Circular 19th November, 1981

which provided that the supervision charges should be recovered on the basis of actual staff posted and not on the basis of actually on the staff sanctioned.

4.7 Mr. Savant has also referred to the order passed by a Division Bench of this Court, in the case of Bhau Distilleries Private limited, Writ Petition No.773 of 1993. In the said proceeding, this Court in the facts of the said case had allowed the Writ Petition. He submitted that the said decision would be applicable in the present facts as well. It is, hence, his submission that the Petition needs to be allowed.

5. On the other hand Mr. Takke, the learned Assistant Government Pleader, has opposed this Writ Petition. Mr. Takke has submitted that the present Petition is not maintainable as the Petitioners are seeking to recover amounts from the Respondents which amounts to making a money claim in a Writ Petition. He further submitted that disputed question of facts are involved, hence, this court should not entertain this Petition. Mr. Takke submitted that the judgment referred by the Petitioner will not be applicable in the facts of the present case, since the facts in the said case were undisputed. It is submitted that in the present

Petition, the Respondents are disputing the facts, as urged by the Petitioner. He further submitted that the Petitioner is referring to recovering supervision amounts paid from September, 1998 to June, 2000. It is his submission that the Petitioners have claimed that they have addressed letters claiming refund on 13th May, 2000 and 8th December, 2000 that is after a gap of more than three years when the Petitioners on 20th March, 2004 through their advocate, have sought refund of a sum of Rs.1,05,533/-. The present Writ Petition was filed on 6th July, 2005, Mr. Takke would, hence, Mr. Takke submits that the Petition needs to be dismissed.

6. We have heard learned counsel for the parties and have gone through the records.

7. The Petitioner in invoking the Writ Jurisdiction of this Court for recovery of Rs.1,05,533/- which according to the Petitioner are the excess charges paid by the Petitioner towards Excise Supervisory Staff for the period September 1998, to June 2000. After a gap of more than 3 years the Petitioner on 20th March, 2004 through their advocates wrote a letter to Respondent No.3, seeking refund of the excess amount paid. Although the claim is for the period up to June 2000, this Petition was filed on 6th July, 2005.

8. In the entire Petition there is not even a whisper, on any steps taken by the Petitioner after the Petitioner addressed letter dated 8th December 2000 to the Superintendent of State Excise, till issuance of Advocate letter dated 20th March, 2004. Much, thereafter the Writ Petition was filed on 6th July, 2005. In our opinion, the issue of delay on the part of the Petitioner, certainly has a significance for the reason that by such lapse of time the ordinary remedy available to the petitioners to recover the said amount by filing a suit, which itself had become time barred. In this situation, certainly a Writ Petition for money claim would not be maintainable.

9. As to whether a Writ Petition under Article 226 of the Constitution of India merely for recovery of money can be entertained is no more *res integra*. We may usefully refer to the Constitutional Bench decision of the Supreme Court in **M/s. Burmah Construction Company vs. The State of Orissa & Ors.**¹, in which the Supreme Court held that the High Court normally does not entertain a petition under Article 226 of the Constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to

1 AIR 1962 SC 1320

the aggrieved party to agitate the question in a civil suit filed for that purpose.

10. In **Life Insurance Corporation of India & Ors. vs. Smt. Kiran Sinha**², the Supreme Court setting aside the judgment of the High Court observed that the High Court could not have directed the payment of the money claimed under the insurance policies in a petition filed under Article 226 of the Constitution. The Supreme Court observed thus:

“The High Court could not have in the circumstances of this case directed the payment of the money claimed under the insurance policies in question in a petition filed under Article 226 of the Constitution. The only remedy available to the respondent in this case was a suit before a civil Court. The judgment of the High Court is, therefore, set aside.”

11. In **Haryana Urban Development Authority & Anr. vs. Anupama Patnaik**³, the Supreme Court held that the High Court had erred in allowing the Writ Petition under Article 226 of the Constitution, which was simplicitor claim for money and when there were disputed questions of fact as in the present case. The observations of the Supreme Court are required to be noted, which reads thus:

“3. It is rather strange that a simple claim for money was made in a writ petition and was entertained by the High Court and allowed. There are several disputed questions of fact.

² AIR 1985 SC 1265

³ (2000) 10 SCC 649

Each party is alleging that the other party is guilty of violation of the terms of the allotment. The matter is not covered by any statutory provisions. The writ petition itself was misconceived and not ought to have been entertained. Accordingly, this appeal is allowed and the judgment of the High Court is set aside. No costs.”

12. Adverting to the above settled principles of law and as made applicable to the facts of the case, we are of the clear opinion that the present petition, which is simplicitor for a money claim, would not be maintainable.

13. Petitioner has also laid much emphasis on internal correspondence being letter dated 10th January, 2001 addressed by Superintendent of State Excise to Sub-Inspector State Excise Department. We have gone through the contents of the letter dated 10th January, 2001. In our opinion such letter is thoroughly irrelevant. Also there is no explanation from the Petitioner as to how it has obtained a copy of this letter which an internal correspondence of the Respondent. The said communication addressed to Sub-Inspector states that from Petitioner's Application, it is difficult to inquire about the matter and, therefore, a request to submit detailed report to the office. As to how such letter dated 10th January 2001, would assist the Petitioner cannot be understood.

14. Petitioner has also argued that an identical issue was decided by this Court by an order dated 31st March, 1993 in proceedings of Bhau Distilleries Private Limited (supra); Paragraph no.3 of the Order dated 31 March 1993, reads as under:

“It is not disputed that in the instant case full recovery is being made from the Petitioner despite the fact that no separate supervision has been provided. The Petition is liable to succeed on this short point. Therefore, Rule made absolute in terms of prayer clause (c). The amount already paid by the Petitioner should be paid by the Petitioner should be adjusted. There shall be no order as to costs.

Prayer clause (c) of that Petition reads as under :-

(c) Pending the hearing and final disposal of the Petition, the Respondents be restrained by an order of injunction from this Hon'ble Court from recovering amount in excess towards the supervision charges in proportion contrary to circular dated 19th November, 1981.

15. It is thus clearly seen that the said order dated 31st March, 1993 proceeds on the footing that was not disputed that a full recovery was made from the Petitioner therein, despite which no separate supervision was provided.

16. The said order hence would not assist the Petitioner. In the present case, the claim of the Petitioners that separate supervision staff was not provided, and the officer as well as the constable were also working in different establishments, is not admitted by the Respondents. The Petitioner has contended that at the relevant time there was one officer, looking after two Trades and one constable, looking after two Trades. As the said fact has

not been admitted by the Respondent, this petition involves disputed questions of fact requiring evidence to be led by the parties. For such reason the dispute in the present proceedings cannot be adjudicated under Article 226 of the Constitution of India.

17. For the aforesaid reasons Petition stands dismissed. Rule is discharged. No order as to costs.

(RAJESH S. PATIL, J.)

(G. S. KULKARNI, J.)