

GAHC010237062023



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : Crl.Pet./1162/2023**

THE STATE OF ASSAM AND ANR.  
REPRESENTED BY THE SECRETARY TO THE DEPARTMENT OF EXCISE,  
JANATA BHAWAN, DISPUR, GUWAHATI-6.

2: SRI PRANJAL PANGING  
DEPUTY SUPERINTENDENT OF EXCISE  
KAMRUP (METRO)  
GUWAHATI CUM INVESTIGATING OFFICER OF EXCISE CASE NO.  
NM/EX.01/202

VERSUS

MODI DISTILLERY AND 2 ORS.  
A UNIT OF MODI INDUSTRIES, MODI NAGAR, GHAZIABAD, UTTAR  
PRADESH, INDIA-201204

2:SRI PARAG JYOTI BORAGI  
MANAGER/AUTHORIZED  
REPRESENTATIVE OF MODI DISTILLERY  
A UNIT OF MODI INDUSTRIES LTD. MODI NAGAR  
GHAZIABAD  
UTTAR PRADESH-201204  
( AREA MANAGER  
CANTEEN STORES DEPARTMENT  
NARENGI CANTT. P.O.SATGAON  
NARENGI-781027  
ASSAM)

3:SRIMOMON HATELI  
LDC(S) IN CHARGE G.P. 5  
CSD DEPOT  
NARENGI

**Advocate for the Petitioner : MR. P N GOSWAMI**

**Advocate for the Respondent : MR JITENDRA DAS**

Linked Case : I.A.(Crl.)/1163/2023

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MODI NAGAR  
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Advocate for : MR JITENDRA DAS

Advocate for : MR. P N GOSWAMI appearing for THE STATE OF ASSAM AND 2  
ORS

**BEFORE  
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

**JUDGMENT & ORDER (CAV)**

**Date : 08-04-2024**

The petitioners in this case are the State of Assam represented by the Secretary to the Department of Excise and Sri Pranjal Panging, Deputy Superintendent of Excise, Kamrup (Metro) cum Investigating Officer (IO for short) of Excise case No. NM/EX.01/2023. The respondents in this case are the (1) Modi Distillery (2) Sri Parag Jyoti Boragi, Manager/authorized representative of Modi Distillery, a unit of Modi Industries, Modi Nagar, Ghaziabad and (3) Sri Momon Hateli, LDC (S) In-Charge G.P. 5, CSD Depot, Narengi. Modi Distillery/Modi Industries Limited (MIL) is a public limited company, which came into existence in the year 1932 with its office at Modi Nagar, Uttar Pradesh.

2. This case in brief is that on 24.02.2023 at about 1:00 P.M., the petitioner No. 2 as directed by the Superintendent of Excise, Kamrup (Metro) visited CSD Depot Narengi, regarding an information submitted by the Officer-In-Charge, CSD, Narengi dated 23.11.2022 under No. NGD/GP-V/Excise/ that consignment of 300 cases i.e. 3,600 bottles of 'Rockford Reserve Fine & Rare Whiskey 750 ml' Batch No. 218/L1 dated November 2022, was imported to CSD Bonded Warehouse Narengi, C/O Narengi Cantt, Satgaon on 16.11.2022 from the Modi Distillery, a unit of Modi Industries, Modi Nagar at Ghaziabad. During the examination of the consignment, it was found that the holograms were missing in clear violation of the Assam Excise Act, 2000 (Act of 2000, for short) and the Rules framed thereunder by not affixing hologram on the bottles at the time of

import. The aforementioned consignment was seized and given in custody to Momon Hateli, LDC (S) In-Charge G.P. 5 for safe custody at CSD Depot, Narengi and the Excise Case No. NM/EX-01/2023 was registered at Noonmati Excise Circle under Sections 58(b) & 64A of the Act of 2000.

3. On 28.02.2023, the petitioner No. 2 forwarded the complaint along with the seizure list to be produced before the learned Chief Judicial Magistrate, Kamrup (M) (CJM for short) regarding the excise case captioned above. Vide order dated 28.02.2023 the learned SDJM (S) No. I, Kamrup (M) had seen seized sample and the same was forwarded for chemical analysis.

4. Meanwhile, a petition for zimma was filed seeking custody of the seized quantity of liquor by Sri Parag Jyoti Boragi/respondent No. 2 herein, Manager/authorized representative of Modi Distillery whereupon, vide order dated 28.07.2023, the IO was called upon to furnish a report if he had objection against the prayer of zimma of the seized articles and whether the respondent No. 2 was the actual owner of the seized articles.

5. On 01.08.2023, Sri Pranjal Panging/petitioner No. 2 submitted his report before the learned Judicial Magistrate 1<sup>st</sup> Class (Magistrate for short) with a prayer to reject the zimma petition, because the CSD Bonded Warehouse Narengi, C/O Narengi Cantt, Satgaon is the consignee and Modi Distillery was the consignor. Thus, the respondent No. 2, Manager/Authorized representative of respondent No. 1, cannot be considered to be the owner of the seized articles. It was also further submitted that the consignment would be required for further investigation.

6. It is contended that vide the order dated 08.08.2023 the learned Magistrate without considering the report dated 01.08.2023 submitted by the

petitioner No. 2, directed the IO to handover the custody of the seized articles to the respondent No. 1. It is averred that the learned Magistrate has also failed to appreciate that the consignment of alcohol was not some article merely involved in the alleged offence, but was the subject matter of the offence itself. The order dated 08.08.2023 has also rendered the powers of the Excise Department under Sections 74 and 75 of the Act of 2000 infructuous to confiscate any intoxicant, receptacles, packages, vessel, conveyance etc., whenever an offence under the Act is committed.

7. It is further contended that under the provisions of Section 71 of the Excise Act, the presumption is that whenever any person is found in possession of any intoxicant for which he fails to provide any satisfactory explanation, it is deemed that he has acted in contravention of the provisions of the Act of 2000, unless the contrary is proved. It is further contended that the learned Chief Judicial Magistrate (CJM, for short) was apprised of the fact that handing over custody of the said consignment to the respondent No. 1 would completely negate the powers of confiscation granted to the authorities under Section 74 of the Act of 2000.

8. The petitioners have filed this application under Section 482 of the Code of Criminal Procedure, 1973 (CrPC for short) for setting aside and quashing the order dated 08.08.2023 passed by the learned Magistrate in Excise Case No. NM/EX.01/2023 on the following amongst other grounds:

- (i) The proviso to Sections 74 and 75 of the Act of 2000 has vested the power to confiscate any article including intoxicant, receptacles, packaging, vehicle etc. involved in commission of any offence under the Act of 2000. The objective of such Legislature is that unlike other offences, any illegal intoxicant confiscation under the Act of 2000 is not

merely an article involved in an offence but also the subject matter of the offence itself.

(ii) Handing over custody of illegal intoxicant to the accused will result in the illegal intoxicant being released to the market and will defeat the provisions of the Act of 2000. In fact, in order to strengthen the provisions, Section 71 of the Excise Act makes the presumption that any person who is found in possession of intoxicant and when the person fails to provide any satisfactory explanation, it shall be presumed that the person has committed an offence under the Act of 2000, unless the contrary is proved.

(iii) It is a settled proposition of law that the general provisions of Section 451 of the CrPC, with regard to custody and disposal of property has to give way and yield whenever a statute makes special provision with regard to confiscation and disposal. The statute has laid down the provisions under Sections 74 and 75 of the Act of 2000.

(iv) Specific powers have been vested upon the District Collector to confiscate any seized article under the Act of 2000, whereupon on investigation, it appears to the District Collector that an offence under the Act has been committed.

(v) When the investigation is still continuing and the chemical analysis of the seized articles is still awaited; granting custody of the illegal intoxicant to the accused person or his representatives will render the aforementioned powers completely infructuous and redundant.

(vi) The learned Magistrate has erred by holding that the company had

no malafide intention in dispatching the aforementioned articles without affixing the holograms and if the bottles are not handed over to zimma of the petitioner, the perishable goods may get damaged under the custody of the investigating authorities.

(vii) In fact, there are specific provisions vide proviso to Section 75 of the Act of 2000 for sale of seized articles, which are liable to speedy and natural decay which would also be beneficial to the owner. Therefore, the mere fact that the accused persons are paying retention fees due to their inability to deliver the goods, does not entitle them the custody of the seized liquor.

(viii) It is further reiterated that the CSD Bonded Warehouse at Narengi is the consignee and respondent No. 2 Parag Jyoti Boragi cannot be considered to be the owner of the seized articles.

9. During the pendency of this petition, an Interlocutory Application (I.A., for short) was filed by the respondents with a prayer to vacate the ex-parte interim order dated 06.11.2023 passed in connection with this case (Crl. Petition No. 1162/2023). It has been averred by the respondent No. 1 represented by the respondent No. 2 that while filing the criminal petition, the petitioners have wilfully suppressed and concealed material facts to procure an order of interim stay in their favour.

10. It is further submitted by the respondents that on 03.10.2022, the Area Manager, Canteen Stores Department, Narengi Army Cantonment, Satgaon, Narengi placed an order for 300 cases i.e. 3600 bottles of "The Rockford Reserve Fine & rare Whiskey 750 ml" for the canteen vide order No. 770959. Immediately after receipt of the order, the Company initiated the process for

delivery of products to the consignee i.e.; CSD Bonded Warehouse, Narengi and the Company was allowed to transport the consignment vide Import Permit/T.P. No. PER316029102200289 dated 29.10.2022 issued by the Deputy Commissioner of Excise, Assam; Excise Pass No. 49-2022-23-FL3-134-13470 dated 10.11.2022 issued by the Uttar Pradesh Excise Department vide R.R./G.R. No. 10712 dated 10.11.2022, through Truck No. HR 38 Z 4312 (Annexure-3 and 4 of the I.A.).

11. It is further submitted that after obtaining the Import Permit and Excise Pass on 10.11.2022, the respondent company issued Invoice of the products for an amount of Rs.8,87,037/- (Rupees Eight Lacs Eighty Seven Thousand and Thirty Seven) including 2% of the CST and Special Fee Cow Cess, vide Invoice No. 3085 in the name of Area Manager, Canteen Stores Department, Narengi Army Canteen, P.O. Satgaon, Narengi.

12. As per provisions of Rule 580 of the Assam Excise Rules, 2016 (Rules of 2016, for short) the licensee of a Foreign Liquour Manufactory, Brewery or country spirit manufactory is required to use hologram i.e. HEAL on liquor bottles to preserve genuineness of the products;

As per the provisions of Rule 581 of the Rules of 2016, the department after following due tender process, grants license to manufacture the holograms.

Furthermore, as per provisions of Rule 582 of the Rules of 2016, the licensee of a Foreign Liquor Manufactory, Brewery or country spirit manufactory is required to procure hologram by making advance payment by way of Demand Draft to the Commissioner of Excise of Assam being 100% of the value of the hologram for selling the liquor bottles in the market.

13. It is further submitted that after obtaining the aforesaid import permit, excise pass and after issuing the invoice, the responded company on 18.11.2022 applied before the Excise Department of Assam for procurement of hologram and consequently, issued a Demand Draft No. 555135 of ICICI Bank for an amount of Rs.16,677/- (Rupees Sixteen Thousand Six Hundred Sixty Seven) in favour of UFLEX Ltd. i.e. in favour of license manufacturer of hologram, for affixing the same on the aforesaid bottles to be supplied to the consignee (the Demand Draft is marked as Annexure-6 of the I.A.).

14. On 27.11.2022, the Excise Department of Assam approved the application for procurement of 30,000 liquor holograms. On 28.11.2022, the UFLEX Limited (Holography Division, Assam) issued a GST invoice vide GST Invoice No. 22650196100301 dated 28.11.2022, for an amount of Rs.16,676/- (Rupees Sixteen Thousand Six Hundred Seventy Six) in favour of the respondent company against the procurement of 30,000 holograms (Annexure-7 and 8 of the I.A.).

15. Thereafter, Hologram Dispatch Permit was issued in favour of the Company. A genuine mistake was inadvertently made by the employees working at the manufacturing unit at Uttar Pradesh and without affixing the hologram, 3600 bottles of "The Rockford Reserve Fine & Rare Whiskey 750 ml" were dispatched to the consignee.

16. When the senior official of the respondent company realised about the inadvertent error, immediately on 28.11.2022, he issued a communication to the Additional Commissioner of Excise, Housefed Complex, Dispur informing him about the error and requested to allow the company to affix the holograms on the said bottles.

17. When the consignment reached the CSD Bonded Warehouse Narengi, the DSE, Kamrup (M) (West) visited the licensed premises of the CSD Depot, Narengi and after an enquiry, a case being NM/Ex-01/2023 under Sections 58(b) and 64A of the Act of 2000 was registered against the respondent company due to lack of holograms on the bottles.

18. It is further submitted on behalf of the respondents that after seizure of the consignment, sample was forwarded for chemical examination and it was reported that no adulteration was detected on chemical examination and the liquor is fit for human consumption.

19. It is submitted that substantial amount has already been paid by the respondent company to the Excise Department of Assam and Uttar Pradesh for procurement of Import Permit as well as hologram. The respondents have approached the authority for zimma of the seized liquor bottles. If the prayer of the respondents for zimma of the bottles seized is not considered, the respondent company will suffer irreparable loss and injury.

20. When the respondents filed an application before the Eleka Magistrate under Section 457 of the CrPC vide petition No. 4024/2023, the learned Magistrate after hearing both the sides vide order dated 08.08.2023 directed the petitioners to hand over the zimma of the seized consignment of whiskey bottles to the respondent company after due and proper verification and on execution of a bond of Rs.10,00,000/- (Rupees Ten Lacs) under the condition that the respondents are to produce the same in the Court as and when directed (Annexure-11 of the I.A.)

21. It is further contended by the respondents that this case has been registered under Sections 58 (b) and 64A of the Act of 2000.

Section 58 of the Act of 2000 discusses about the breach of rule or condition.

The punishment for violation of Section 58 (b) of the Act of 2000 is a lenient punishment of only fine.

Section 64A of the Act of 2000 discusses about the commission of offence by companies.

On a conjoint reading of both the Sections 58(b) and 64A of the Act of 2000, it can be understood that if the company has committed any offence then the company is liable to fine.

22. The respondents have denied any malafide while dispatching the consignment without affixing the holograms. The company had made every endeavour for procurement of hologram but inadvertently the holograms were not affixed. This inadvertent error cannot be considered to be violation of any of the provisions of the Act of 2000 and the Rules of 2016. The annexure and documents annexed along with the I.A. clearly reveals the intention of the company/respondent to affix the holograms, which were already procured. It cannot be ignored that the spirit/whiskey in the bottles is fit for human consumption.

23. It is further averred on behalf of the respondents that the documents submitted in support of the procurement of holograms have not been disputed by the petitioners as fake.

24 The respondents have prayed for zimma of the consignment as they will suffer irreparable loss. They have a prima facie case as no malafide is discernible from the conduct of the respondents. Equity will prevail if their submission is considered, as stringent action against an inadvertent mistake

may lead to failure of justice.

25. A reply was filed against the I.A. by the petitioner No. 2 Sri Pranjal Panging, DSE. Through the reply, it has been contended that the impugned order dated 08.08.2023 has rendered infructuous, the powers of the Excise Department under Sections 74 and 75 of the Act of 2000, to confiscate any intoxicant, receptacles, packages, vessel, conveyance etc. Unless the contrary is proved, Section 71 of the Act of 2000 envisages presumption, whenever any person is found in possession of any intoxicant, and who fails to give any satisfactory explanation.

26. It is further contended by the petitioner No. 2 that the Import Permit was issued on 29.10.2022 which was valid till 27.12.2022.

27. The respondents applied for hologram on 18.11.2022 (Annexure-6 of the I.A.) whereas the consignment was received by the consignee i.e. CSD Bonded Warehouse Narengi on 16.11.2022, after two days. The Department approved the application of the applicant for procurement of holograms on 28.11.2022 (Annexure-9 of the I.A.) Meanwhile the Officer-In-Charge, CSD Narengi vide letter dated 23.11.2022 intimated the Superintendent of Excise for non-affixation of holograms.

28. Heard Mr. I. Borthakur, learned counsel on behalf of Mr. D. Gogoi, learned Standing Counsel for the Excise Department (Government of Assam) for the petitioners and Mr. B. Dutta, learned Senior Counsel assisted by Mr. S. Deka, learned counsel for the respondents.

29. I have considered the submissions at the bar with circumspection.

30. This case is still at its nascent stage. Investigation was initiated and was still under progress when the order dated 08.08.2023 passed by the learned

Magistrate was stayed by this Court vide order dated 06.11.2023. There are allegations and counter allegations. It has surfaced through the submissions of both the sides that holograms were indeed not affixed in violation of the provisions of Rule 580 of the Rules of 2016.

31. This petition is filed under Section 482 of the CrPC. At this juncture, a mini trial cannot be held. However, if the documents submitted along with this petition and the I.A.(Crl.) No. 1163/2023 are scrutinized, it is clear that the Officer-In-Charge, Narengi had informed the Superintendent of Excise, Kamrup (M) vide reference No. NGD/GP-V/Excise on 23.11.2022 that the liquor consignment received on 16.11.2022 bearing 300 cases of Rockford Reserve Fine & Rare Whiskey from M/S Modi Distillery, Modi Nagar, Ghaziabad, Uttar Pradesh, consisted of bottles without Hologram. Investigation commenced and 300 cases of bottles '750 ml each' of whiskey were seized vide Annexure-B of the criminal petition i.e., seizure list, on 28.02.2023 at 2:45 P.M.

32. Annexure-9 of the I.A. is the Hologram Dispatch Permit which reflects the date of issue as 28.11.2022. Annexure-8 dated 28.11.2022 is the GST invoice for an amount of Rs.16,676/- (Rupees Sixteen Thousand Six Hundred Sixty Seven) for 30000 holograms. Annexure-7 dated 22.11.2022 is relating to procurement of holograms by Modi Distillery and Annexure-6 is the cheque in the name of UFLEX Ltd., issued by Modi Distillery for Rs.16,677/- (Rupees Sixteen Thousand Six Hundred Seventy Seven) on 18.11.2022.

33. A scrutiny of the documents reveal that the respondents had applied for holograms to be affixed on the said whiskey bottles on 18.11.2022. It cannot be dismissed without proper verification of all the relevant documents as well as evidence that when the respondents learnt about the fallacy of dispatching the bottles without holograms, they applied for holograms on 18.11.2022. The

Superintendent of Excise was informed about the fallacy/mistake relating to the lack of holograms on 23.11.2022. The bottles reached CSD Canteen Godown on 16.11.2022. Thus before the fallacy was detected, it appears that the respondents have already embarked into the process of procuring the holograms (Annexure-5, 6, 7, 8 and 9). The relevant documents relating to placing the order and making the payment to the UFLEX for the holograms have been annexed along with the I.A. (Crl.) No. 1163/2022. When the petitioners have filed this petition, they have also stated that there are specific provisions vide proviso to Section 75 of the Act of 2000 for sale of the seized articles, but at the same time they are liable to speedy and natural decay and it will also be beneficial to the owner.

34. Although no documents relating to the chemical analysis has been annexed along with the petition or interlocutory application, the respondents have emphasized through their application that the chemical analysis report reveals that the whiskey was not found to be spurious and was fit for human consumption. At this juncture it cannot be held conclusively that the holograms were not deliberately affixed and the respondents had violated Sections 58(b) and 64A of the Act of 2000 by not following the SOP issued by the Additional Commissioner of Excise, Assam dated 08.02.2022.

35. On 28.11.2022, the Hologram Officer, Office of the Commissionerate of Excise, Assam issued holograms dispatch permit in favour of the respondent company with respect to 30,000 holograms .

36. The petitioners are not willing to rely on the submission of the respondents that when the respondents realized the inadvertent error, the respondent company immediately issued a communication to the Additional Commissioner of Excise, Housefed Complex, Dipur on 28.11.2022 with a request

to allow them to affix the holograms on the liquor bottles. It appears that the process of obtaining holograms was initiated on 18.11.2022 whereas the DSE learned about the missing holograms and informed about the same on 23.11.2022. However, without proper scrutiny of evidence, the respondents claim that they had already applied for holograms, cannot be affirmed at this stage.

37. It has to be borne in mind that this is a petition under Section 482 of the CrPC which prescribes:

*“482. Saving of inherent power of High Court. – Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.”*

38. This Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it, accusation would not sustain. An inherent jurisdiction under Section 482 of the CrPC has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the Section under which the petitioner is booked or charge have been framed. For the ends of justice, the inherent power can be invoked but at the same time, this Court cannot accord remedy like an appellate Court.

39. While passing the impugned order dated 08.08.2023, the learned Magistrate has directed the respondent No. 2, attorney holder of the respondent No. 1 to produce the bottles given in zimma to the respondent No. 2 as and when required by the Court. Thus, there appears to be no justified ground for any suspicion that the whiskey will be available to the public.

40. This puts the suspicion of the petitioners to rest, because the impugned order itself reflects that the 300 cases of Rockford whiskey were given in zimma

to the respondent Company on their execution of a bond of Rs.10,00,000/- (Rupees Ten Lacs) under the condition that the Company is to produce the same in the Court as and when directed. As the respondents have resisted the prayer for setting aside the order impugned by the petitioners, it appears that they are not aggrieved by the said order and they are also willing to produce the whiskey as and when required by the Court during the period of investigation and trial.

41. In the wake of my foregoing discussions, the petition is hereby dismissed.

42. No order as to costs.

**JUDGE**

**Comparing Assistant**