IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Writ Jurisdiction Case No. 627 of 2017
Arising out of P S. Case No. - 46 Year - 2017 Thana - Alamganj District - PATNA
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1. M/s Smart India Marketing Proprietorship Concern through its Proprietor Paras Nath Jha having its office and godown at Biscoman Golambar, Bajrangpuri Colony, Anand Nagar, P.S. - Alamganj, District - Patna.
2. Paran Nath Jha, Son of Yogendra Jha, Resident of Village - Araji Nainha, P.S. Hajipur Sadar, District - Vaishali.

.... Petitioners

Versus

1. The State of Bihar
2. The Commissioner, Excise Department, Government of Bihar, Patna.
3. The Assistant Commissioner, Excise Department, Government of Bihar, Patna.
4. The District Magistrate, Patna.
5. The Senior Superintendent of Police, Patna.
6. The Officer In-Charge, Alamganj Police Station, Patna.

.... Respondents
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Appearance :

For the Petitioners : Mr. Prashant Kumar Shahi, Sr. Advocate
Mr. Vipin Kumar, Advocate
For the Respondents : Mr. V. Giri, Sr. Advocate
Mr. Keshav Mohan, Advocate
Mr. Piyush Choudhary, Advocate
Mr. Manav Vohra, Advocate
Ms. Svadha Shankar, Advocate
Mr. Ajay Kumar Sharma, A.C. to A.G
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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT
Date: 05-11-2017

Heard, Mr. Prashant Kumar Shahi, learned Senior Counsel for the petitioners and Mr. V. Giri, learned Senior Counsel for the respondents.

2. This writ application, under Articles 226 and 227 of the

Constitution of India, has been brought for quashing of the FIR of Alamganj P.S. Case No. 46 of 2017, registered on 09.02.2017 for the offence under Section 30(a) of the Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as the "Act") vide Annexure-2. Further prayer is for a direction to the respondents to de-seal the premise of the petitioners which was sealed in connection with the aforesaid case and to restore the possession along with all the articles stored therein. Third prayer is for restraining the respondents from interfering in the trade of the petitioners in the garb of regulating the business in exercise of power conferred under the Act.

3. By way of interim measure, this Court had directed the respondents to de-seal the sealed premise by order dated 17.07.2017 and, subsequently, by order dated 01.08.2017, this Court directed interim release of the seized goods in favour of the petitioners on execution of the referred surety bond.

4. The State of Bihar and other respondents challenged the aforesaid interim order before the Hon'ble Apex Court in Criminal Appeal No. 1658-1659 of 2017. The appeal was disposed of on 15th September, 2017, with following relevant observations recorded in para 4 and 5 of the order:-

> *"4. Having regard to the contentions raised by the learned Senior Counsel based on the Notification dated 24.01.2017 issued under Section 24(1) of the Bihar Prohibition and Excise Act, 2016, we are of the view that*

the matter needs to be finally decided by the High Court expeditiously. Therefore, we dispose of these appeals with a request to the High Court to dispose of the main writ petition, being Criminal Writ Jurisdiction Case No. 627 of 2017 expeditiously and preferably within six weeks from today.

5. We make it clear that it will be open to the respondents, in case they choose so, to amend the pleadings as well within two weeks from today. Till the writ petition is disposed of, the implementation of the interim order passed by the High Court for de-sealing and releasing of goods shall be deferred."

5. After the aforesaid order, the petitioners (the respondents before the Supreme Court) filed I.A. No. 2088 of 2017 for addition of two more reliefs which are as follows:-

"(a) To hold that notification dated 24.01.2017 issued in exercise of power conferred under Section 24(1) of Bihar Prohibition and Excise Act, 2016 is inapplicable in the facts of the case.

(b) For a direction upon the respondent-authority to pay appropriate compensation along with interest which has been caused due to discriminatory action of the respondent-authority."

6. The addition of the aforesaid prayer was allowed by order dated 07.11.2017.

7. Learned Senior Counsel for the petitioners submits that the State of Bihar advanced wrong statement before the Supreme Court regarding applicability of the provisions of Section 24(1) of the Act or of the notification dated 24.01.2017 because those provisions and notifications relates to power of the State to grant licence etc.

8. It was conceded by Mr. V. Giri, learned Senior Counsel appearing for the respondents that notification dated 24.01.2017 issued under Section 24(1) of the Act is not relevant for this purpose as the notification relates to grant etc. of licence for the referred purpose. Moreover, there is statement on oath of the respondents, in para 8 of the reply to the I.A. No. 2088 of 2017 filed by the petitioners, stating therein that the provisions of Section 24(1) of the Act is not applicable in the present case as the petitioners are not holding any licence under the Act.

9. The case of the petitioners is that the petitioner no. 1 is a proprietorship concern and petitioner no. 2 is its sole proprietor. The concern is registered with the Sales Tax Department having CST VAT No. 101339840055. The petitioners have taken marketing right for the entire State of Bihar and Jharkhand for marketing the products manufactured by M/s DD Food Products, Nagloi, Najafgarh Road, New Delhi. The aforesaid right was created in favour of the petitioners in pursuance of an agreement dated 01.12.2016. It is further case of the petitioners that the manufacturer is manufacturing its product after complying with all the legal formalities including checking and approval by the Food Safety Regulator. The petitioners are running their business on a rented premise at BISCOMAN Golambar, Bajrangpuri Colony under Alamganj Police Station in the district of Patna. The petitioners further got the samples of the article examined and analyzed by the Chemist of Excise Department, who confirmed, after examination, that the products are non-alcoholic vide report dated 29.12.2016 at Annexure-1.

10. On 09.02.2017, a news item flashed in Dainik Bhaskar, Daily News Paper stating that in name of energy drink, Beer is being sold. Only on the basis of aforesaid report and without making any inquiry and verification, the respondent-Assistant Commissioner of Excise made a written complaint to Alamganj Police Station and on the basis whereof the impugned FIR was lodged against the petitioners. On the same day, the business premise of the petitioners was sealed by the respondent-authorities for the reason that they could not contact the petitioners on mobile phone and on presumption that alcoholic beverage is being sold by the petitioners in the name of energy drink. On the very next day i.e. on 10.02.2017, again the respondent-authorities visited the premise and prepared a seizure list of the articles and handed over a copy of the same to the landlord. A copy of the seizure list is at Annexure-3. The respondents further sent the samples for chemical examination to the expert and the report of the expert would reveal that maximum 0.5 per cent ethyl alcohol was found in the sample vide report at Annexure-4.

11. According to learned Senior Counsel for the petitioners, the aforesaid quantity is not enough to state that the substance is alcoholic substance in view of the standard fixed by Bureau of Indian Standard. Therefore, submission of the learned Senior Counsel for the petitioners is that the FIR discloses no offence under the Act, hence, criminal prosecution of the petitioners is an abuse of the process of the Court.

12. Submission of the learned Senior Counsel for the petitioners is that the State Legislature is competent only to legislate on portable beverage i.e. beverage which is fit for human consumption and unless it is found that the beverage was containing intoxicant, the offence, under the Act, cannot be made out. Further submission is that even fruit juice contains some portion of alcohol which might be due to fermentation process due to lapse of time. It is specific case of the petitioners that the petitioners were dealing with soft drink, which is in contrast to the hard drink containing alcoholic substance, as specified in the BIS norms. Learned Senior Counsel has took the Court to the different provisions of the Act which shall be referred hereinbelow for his contention that the seized sample and the result of its chemical examination does not reveal that the same does not confirm to the BIS norms of non-alcoholic substance. Hence, the same were not intoxicating substance or Beer which is prohibited under the Act. The respondents, in a very casual and mechanical manner and only on the basis of misleading news report, have instituted the FIR just with intent to unnecessarily harass the petitioners. Hence, this is a fit case for quashing of the FIR and for grant of other reliefs as prayer for.

13. The respondent no. 3 and 4 in their separate counter affidavit and supplementary counter affidavit dated 16.08.2017 resisted the prayer of the petitioners on the basis of Annexure-A, a report submitted by Senior Scientific Officer in respect of the chemical examination of certain sample of suspected alcoholic fluid marketed by the petitioners and seized by the Excise Authorities at Muzaffarpur wherein approximately 1.2 per cent ethyl alcohol was noticed.

14. The petitioners have seriously challenged the correctness of Annexure-A on the ground that the respondents have not disclosed the source regarding the specific case under which the same was seized and sent to Forensic Science Laboratory, Patna, though there is a similar Laboratory at Muzaffarpur.

15. Mr. V. Giri, learned Senior Counsel submits that the respondents have imposed complete prohibition on sale, possession or consumption of liquor w.e.f. 05.04.2016 in order to effectively enforce the policy of zero tolerance towards enforcement/implementation of the Act. The aim and object of the Act would clearly show that the Legislature desired to enforce, implement and promote complete prohibition of liquor and intoxicants in the territory of the State of Bihar. The definition of the word “alcohol” in Section 2(2) and the word “alcoholic” in Section 2(3) would show that alcoholic means a solution or mixture containing alcohol and being of any strength and purity. The same goes to show that quantity of alcohol to any miniscule extent is prohibited under Section 13 of the Act and is punishable under Section 30(a) of the Act. Therefore, according to learned Senior Counsel, the ingredients of the offence are clearly made out. Hence, the petitioners deserve no relief from this Court in exercise of this extra ordinary jurisdiction.

16. Learned Senior Counsel submits that in view of the stringent provisions of the Act regarding complete ban on use of any quantity of alcohol even the soft drink or any beverage which grows alcoholic in due course comes within the mischief of the Act. He further submits that it depends upon the quantity consumed and not the quantity available in the liquor to ascertain whether it was an intoxicant.

17. According to First Information Report lodged by the Assistant Commissioner of Excise, Patna the informant got news through Dainik Bhaskar, Daily News Paper dated 09.02.2017 that in the name of energy drink, Beer is being sold. The name of the drinks was Thunder Volt and Kingfarmer which resembles the name of branded Beer. Thereafter, a team was constituted by the informant and business premise of the petitioners was raided. The premise was found closed. Hence, a lock was put on that on suspicion that Beer was being sold in the name of energy drink. On the very next day i.e. on 10.02.2017, a seizure list was prepared vide Annexure-3 and, simultaneously, for chemical examination samples were also taken out of the seized beverage. The chemical examination of the sample was done by the Chemical Analyst of the Excise Department and the three samples were found containing 0.5 per cent alcohol, 0.2 per cent alcohol and 0.2 percent alcohol.

18. There is no dispute that the FIR was lodged on suspicion based on the news paper report and that the chemical examination report at Annexure-4 is a genuine document. Thus, the only question to be decided, in this writ application, is whether the provisions of the Act makes it sufficiently clear that any quantity of alcohol found in any liquor would attract the Penal provisions of this Act or the conjoint reading of the provisions of Sections 13, 30(a), 2(3) and 2(4) of the Act leaves any scope for escape from the mischief of the provisions of Law as claimed by the petitioners.

19. Section 13 of the Act is being reproduced below:-

> *"13. Prohibition of liquor or intoxicants. — No person shall manufacture, bottle, distribute, transport, collect, store, possess, purchase, sell or consume any intoxicant or liquor:*
>
> *Provided that the State Government may, by notification, allow renewal of the existing licensees for manufacturing, blending, compounding, bottling, storage, import and export of any liquor or intoxicant subject to the provisions of this Act;*
>
> *Provided also that the State Government may, by notification, allow any state owned company to undertake such activities as may be required under the Act.*
>
> *Explanation. — The words "Existing Licensee" mean persons, firms etc who are holding a valid license*

on the day of this Act coming into force."

20. The aforesaid provision clearly shows that there is prohibition of certain acts including sale (in the present case) of any intoxicant or liquor.

21. Sections 30(a) and 30(g) which have been relied by the learned Senior Counsel for the parties are being reproduced below:-

> *"30(a) manufactures, possesses, buys, sells, distributes, collects, bottles, imports, exports, transports or removes any intoxicant or liquor; or*
> *30(g) manufactures, possesses, sells, distributes, bottles, imports, exports, transports or removes, any preparation or ingredient made with or without the use of any intoxicant or liquor, which can serve as an alcohol or a substitute for alcohol and is used or likely to be used or consumed for the purposes of getting intoxicated,*
> *Shall be punishable with imprisonment for a term not less than ten years but which may extend to imprisonment for life and with fine which shall not be less than one lakh rupees but which may extend to ten lakh rupees.*
> *Explanation. — "Possession" here means the possession by any family or member of that family and includes the knowledge of possession where any member of a family or the family itself know that such possession is illegal, whether it is in his or her own possession or with some other member of the family."*

22. The words "intoxicant" and "liquor" have been defined in Section 2(40) and 2(44) of the Act as follows:-

"2(40) "intoxicant" means ----

(i) liquor, or

(ii) Spirit including silent spirit or ENA, or

(iii) Methyl Alcohol, or

(iv) Ethanol, whether denatured or not; or

(v) any substance from which the liquor may be distilled and which is declared by the State Government by notification in the Official Gazette to be an intoxicant for the purpose of this Act, or

(vi) intoxicating drug, or

(vii) medicinal preparation as defined under Medicinal and Toilet Preparations (Excise Duties) Act, 1955; or

(viii) any preparation or ingredient, either medicinal or otherwise, whether solid, semi solid, liquid, semi liquid or gaseous, either made locally or otherwise, that may serve as an alcohol or a substitute for alcohol and is used or consumed for the purposes of getting intoxicated."

2(44) "Liquor" means country or traditional liquor, Indian Made Foreign Liquor, foreign liquor or any preparation or ingredient, whether solid, semi solid, liquid, semi liquid or gaseous, either made locally or otherwise, that may serve as an alcohol or a substitute for alcohol and is used or consumed for the purposes of getting intoxicated;"

23. A bare perusal of the aforesaid provision would make it abundantly clear that to attract the Penal provisions of Section 30(a) or 30(g) of the Act, the substance must be of intoxicant or liquor which can serve as an alcohol or for a substitute of alcohol and is used or likely to be used or consumed for the purposes of getting intoxicated. There is no dispute that the State Legislature has competency to make law only in respect of portable liquors and not in respect of non-portable liquors.

24. Section 2(2) of the Act defines the word "alcohol" as follows:-

> *"2(2) "Alcohol" means Ethyl Alcohol having a colorless volatile flammable organic liquid which is produced by a natural or yeast fermentation of sugars and is intoxicating constituent of wine, beer, spirits, and other alcoholic beverages, and is also used as an industrial solvent and as fuel;"*

Section 2(3) of the Act defines the word "alcoholic" as follows:-

> *"2(3) "alcoholic" means a solution or mixture containing alcohol and being of any strength and purity;"*

Section 2(4) of the Act defines the term "alcoholic beverage or portable liquor" as follows:-

> *"2(4) "alcoholic beverage or portable liquor" means any beverage containing alcohol in conformity with the BIS standards which may be intoxicating and is fit for human consumption;"*

Section 2(6) of the Act defines what is "BIS standard" as follows:-

> *"2(6) "BIS standards" means standard prescribed by*

> *Bureau of Indian Standards or the standards prescribed by any other Central Government authority, constituted under the relevant Act;"*

25. Learned Senior Counsel for the petitioners has produced a copy of the BIS specification of carbonated beverages non-alcoholic Beer. The same is not disputed by the respondents. Hence, is being reproduced below:-

Indian Standard

CARBONATED BEVERAGES –
NON-ALCOHOLIC BEER – SPECIFICATION

1 SCOPE

This standard prescribes the requirements and methods of sampling and test for non-alcoholic beer.

2 REFERENCES

The Indian Standards listed in Annex A are necessary adjuncts to this standard.

3 TERMINOLOGY

3.1 Non-Alcoholic Beer

It is a beverage containing less than 0.5 percent ethyl alcohol by volume.

4 REQUIREMENTS

4.1 General

Non-alcoholic beer shall be the product of alcoholic fermentation or otherwise of a mash in potable water of malted barley and hops or concentrate of hops with or without the addition of other malted or unmalted cereals or other carbohydrate preparations.

4.2 Freedom from Harmful

Amount of saccharin in the product shall not exceed by 100 mg/kg when determined by the method given in Annex A of IS 2346 : 1973.

4.5 Freedom from Added Colouring Matter

Non-alcoholic beer shall be free from any artificial colour except caramel.

4.6 Freedom from Added Alcohol

Non-alcoholic beer shall be free from any added alcohol.

4.7 Carbon Dioxide Content

Non-alcoholic beer shall be charged with carbon dioxide before bottling.

4.8 Pasteurisation

Bottled non-alcoholic beer shall be effectively pasteurized, if required.

Ingredients Non-alcoholic beer shall be free from any ingredients injurious to health. **4.3 Preservatives** Non-alcoholic beer may contain preservatives permitted under the Prevention of Food Adulteration Rules, 1954. **4.4 Artificial Sweetners** Non-alcoholic beer shall be free from artificial sweetening agents except saccharin.	**4.9 Organoleptic Requirements** Non-alcoholic beer shall be clear and have the characteristic colour, taste, bouquet and foam of its type. **4.10. Hygienic Conditions** Non-alcoholic beer shall be manufactured in premises built and maintained under hygienic conditions in accordance with IS 5837 : 1970 **4.11** The material shall also conform to the requirements given in Table 1.

Sl No.	Characteristic	Requirement	Method of Test, Ref to
(1)	(2)	(3)	(4)
i)	Ethyl alcohol content, percent by volume at 15/15C, Max	0.5	IS 3752 : 1988
ii)	pH	3.5 to 4.5	IS 3865 : 1978
iii)	Carbon dioxide, v/v	2.5 to 3.0	IS 2346 : 1973
iv)	Residue on evaporation, percent (m/v)	5 to 10	IS 3752 : 1988
v)	Arsenic, mg/kg, Max	0.25	IS 6854 : 1973
vi)	Lead, mg/kg, Max	0.5	IS 6854 : 1973
vii)	Copper, mg/kg, Max	1.5	IS 6854 : 1973
viii)	Iron, mg/kg, Max	0.5	IS 6854 : 1973
ix)	Total plate count, per ml, Max	50	IS 5402 : 1969
x)	Coliform count, in 100 ml	0	IS 5401 : 1969
xi)	Yeast and mould count	2	IS 5403 : 1969

26. It is well settled that the statutory provisions cannot be read in isolation to gather the aim and object of the Legislature in bringing the Law in force. If the Legislature would have intended to put complete prohibition even on non-alcoholic beverage as per the standard of BIS, there was no need to incorporate clarification in the form of definition of the word "alcoholic beverage or portable liquor" under Section 2(4) of the Act. Only definition under Section 2(3) of the Act was enough to fulfill the aforesaid desire.

On a careful consideration of the aforesaid statutory provision, it is evident that what the Act prohibits is the intoxicant or liquor containing alcohol of any strength and purity, as per the definition of "alcoholic" under Section 2(3) of the Act. Simultaneously, it does not prohibit sale etc. of the non-alcoholic substances in conformity with the standard set by the BIS in view of the definition and clarification contained under Section 2(4)(6) of the Act.

27. In the present case, only ethyl alcohol of 0.5 and less per cent has been found by the expert as per Annexure-4. Hence, this Court is concerned only with alcoholic substance out of the different intoxicants. Moreover, the Penal provision must be specific with all clarity. In the present case, the Act specifies that alcoholic beverage or portable liquors should confirm to the standard fixed by BIS. Thus, in my consideration, the petitioners were selling non-alcoholic substance, according to the BIS standard. Hence, it cannot be said that the petitioners have committed any offence under the Act or the FIR discloses any offence much less any cognizable offence said to be committed by the petitioners.

28. The Law is well settled that if the FIR does not disclose a cognizable offence, it would be fit to be quashed for the reason that its continuance would amount to an abuse of the process of the law and would occasion failure of justice.

29. There is no dispute that Annexure-A to the counter affidavit which is a report of chemical examination was not in respect of the samples collected in the present police case nor anything has been brought on the record as to in which case the aforesaid seizure was made and chemical examination was conducted. Therefore, Annexure-A to the counter affidavit is of no help in the present facts and circumstances of this case. I do not find any substance in the submission of learned counsel for the respondents that even though soft drinks which will grow alcoholic in future would come within the mischief of the Act. The Law is well settled that the offence is to be determined on the date of its commission and if on the date of seizure, the soft drink was not containing any alcoholic substance, the offence was not committed as per the provisions of the Act.

30. The petitioners are not entitled to any relief for compensation because no material has been brought on the record to establish mala fide prosecution by the respondents. Moreover, the damage to the seized articles has been caused due to the judicial process of the case as referred above.

31. To conclude, in my view, for the aforesaid discussion, the FIR of Alamganj P.S. Case No. 46 of 2017 is fit to be quashed and, accordingly, the same stands quashed. The respondent-authorities are directed to immediately de-seal the seized business premise of the petitioners and hand over possession of the sealed articles to them.

32. Accordingly, the writ application stands allowed.

(Birendra Kumar, J)

Kundan Sharma

AFR/NAFR	A.F.R.
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