IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.421 of 2018

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1. Cosmos Beverages Pvt. Ltd. Thakur Nagar (Eastern By Pass Road), P.O. Sahudani Hat, District- Jalpaiguri- 735135 (W.B.) through its Power of Attorney Holder Bivash Chandra Bose, C/O M/S EAST INDIA TRANSPORT AGENCY, having its Reg. Office at 20 B Abdul Hamid Street, Kolkata- 700069 (W.B.).

2. M/S EAST INDIA TRANSPORT AGENCY, A Unit of Eita India Ltd. HO. 20B, Abdul Hamid Street, Kolkata- 700069 (W.B.)

.... Petitioners

Versus

1. The State of Bihar.
2. The Excise Commissioner, Bihar, Patna.
3. The District Magistrate, Kishanganj, Bihar.
4. The Excise Superintendent, Kishanganj, Bihar.
5. The Deputy Excise Superintendent, Kishanganj, Bihar.

.... Respondents

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Appearance :

For the Petitioners : Mr. Rajesh Kumar Singh, Advocate
Mr. Manish Kumar Singh, Advocate
Mr. Dharmendra Kumar Singh, Advocate

For the Respondents : Mr.

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 27-03-2018

The writ petitioners have moved this Court in its extraordinary writ jurisdiction for setting aside the order dated 22.11.2017 passed by the Excise Commissioner, Bihar Patna. By the impugned order, the Excise Commissioner, Bihar has rejected the appeal preferred by the petitioners for release of 550 Cartoons (4842.00 liters) of Mac Dowell No.1 whisky as per seizure list dated 6.5.2016 with the Truck bearing number WB-51A/7310 which has been confiscated under Section 58(2) of Bihar Prohibition and Excise Act, 2016 and thereby he refused to interfere with the confiscation order passed by the Collector in Excise Case No.08/2016-17.

2. Petitioner no.1 is a private limited company incorporated under the provisions of the Companies Act, 1956 and is the manufacturer of the whisky seized on 6.5.2016 by Sub Inspector of Excise, Kishanganj. Petitioner no.2 is the Authorized Carrier having its office in the State of West Bengal at Kolkata. It is the common case of the petitioners that while the Goods were being carried to its destination at Kolkata from Siliguri on Truck No.WB-51A/7310, the same was intercepted around Farig Gola Check Post (Kishanganj) by Sub Inspector, Excise and a seizure list was prepared which detailed the goods and the documents along with Truck seized on 6.5.2016. They have specifically stated that this is the only route to Kolkata via NH 37.

3. A copy of the report along with seizure list have been brought on record by way of Annexure-2 series to the present writ application. The petitioners claim that the documents seized and

mentioned in the seizure list would show that the exclusive possession and ownership of the petitioners are not in dispute and further that the petitioners were in possession of goods with valid and bonafide as also proper documents and all the applicable taxes have been paid thereon. Copy of the consignment note bearing details including from destination and invoice No. with date has been enclosed as Annexure-3 to the writ petition. The petitioners have also placed on record that the Lorry Challan having entire description including name of driver, his PAN No., quality of wine and other details were very much available and filed before the Collector, Kishanganj for purpose of release of the goods seized.

4. The petitioners have brought on record (Annexure-5 to the writ petition), which is a report of the Excise Department, Government of West Bengal stating that " there is no doubt regarding the genuineness of the consignment of 550 cases of Foreign liquor which was issued from Cosmos Beverages Pvt. Ltd., FL Trade (Consignor), Eastern Bye Pass Road, Thakur Nagar, P.O.: Sahudangi Haat, District- Jalpaiguri, Pin – 735135 and was en-route to Essbee Intech Pvt. Ltd., FL Trade (Consignee), 15 CanalEast Road, Kolkata (North), Pin- 700067 under the cover of Transport Pass no: FLDT/2016-2017/00081074 dated 5.5.2016 in vehicle bearing registration no.WB51A-7310 and the validity of the consignment was

for 72 hours i.e. 8.5.2016 up to 4.40 P.M.”

5. Learned counsel representing the petitioners submits that the impugned order by which the Collector-Cum-District Magistrate, Kishanganj has confiscated the vehicle and the Articles seized as also the order by which the Excise Commissioner, Bihar has rejected the appeal preferred by the petitioners against the order of confiscation are wholly illegal, arbitrary and bad in law.

6. Pointing out the infirmities in the impugned order passed by the Excise Commissioner, learned counsel submits that the finding of the Commissioner that the appellants did not comply with the requirement of digital locking system has no basis to stand. It is his contention that if the digital locking facility was available at the Farig Gola Check Post and it was a requirement provided for the vehicle passing through the National Highway en route to West Bengal via the territories of the State of Bihar it was for the authorities concerned and competent on this behalf to provide the digital locking facility and a valid transit permission but for this the petitioners cannot be held liable. It is further submitted that the Commissioner has failed to consider that there was a valid document of Export and Import Pass and by Annexure-5 to the writ application, the Assistant Commissioner of Cosmos Beverages Pvt. Ltd. Thakur Nagar, Jalpaiguri has confirmed about the genuineness of the consignment in

question. Learned counsel submits that the finding of the Excise Commissioner that the appellant has failed to explain the difference of quantity of liquor as mentioned in the Invoice and actually found in the Truck on physical verification is again not well founded inasmuch as it would appear from the seizure list that the total quantity as per seizure list is 4786.68 liters whereas the transport pass and the invoice shows 4842.00 liter which cannot be said to be any significant discrepancy. It is submitted that from the impugned order passed by the Collector (Annexure-6 attached to the supplementary affidavit of the petitioners), it would appear that one unsealed Macdoval No.XXX was allegedly found in the Cabin of the driver and the driver was in drunken condition for which he may only be liable in terms of the provisions of the Act, but there cannot be a vicarious liabilities upon these petitioners for the act of the driver. In the seizure list even this seizure of 0.600 liter (unsealed) has been shown whereas the same is not the part of the consignment and, therefore, the consignment of 550 Cartoons and the Truck in question have been wrongly confiscated.

7. On the other hand, learned counsel representing respondent no.3 has opposed the writ application on the ground that the petitioners have one more right to appeal as per statutory provision under Section 92(2) of the Bihar Prohibition and Excise Act, 1916 (hereinafter referred to as 'Prohibition Act'). It is the contention of the

learned counsel representing respondent no.3 that the petitioners have moved this Court without availing the alternative and efficacious remedy of appeal. Learned counsel submits that the consignment of 550 Cartoons (4842 bulk liters) was seized as there was no export or import permit though number of Export and Import permit was mentioned in this invoice. He also submits that in course of search and on physical verification only 4786.67 bulk liters foreign liquor in the Truck was found instead of 4842 bulk liters as noted in the invoice. Learned counsel submits that as per Clause (2), Sub Clause GH(v) of the Bihar Gazette Notification No.1342 dated 21.12.2015, all vehicles loaded with excisable articles in movement through the State of Bihar must be digitally locked but the vehicle in question loaded with Indian made foreign liquor was not digitally locked and further no valid excise Import and Export permit was found in the Truck in question. He would submit that the confiscation order has been passed by the Collector-Cum-District Magistrate, Kishanganj on 7.4.2017 giving reasons and after hearing the parties which has only been affirmed in appeal by the Excise Commissioner. In paragraph-3 of the supplementary counter affidavit filed on behalf of respondent nos.3 and 4, it is stated that so far the report of Government of West Bengal, Excise Department dated 17.6.2016 is concerned, it was verified by Inspector of Excise, Kishanganj and during verification it was found that the report of Government of West Bengal, Excise Department dated 17.6.2016 to be correct. It is submitted that the difference of quantity in the physical verification and the seizure list show the criminal intention of the writ petitioner.

8. In course of hearing of the writ application, learned counsel for the petitioners has pointed out to this Court that the confiscation order has got a civil consequence and it is penal in nature. He would further submit that from the counter affidavit and supplementary counter affidavit of the respondent no.3 itself, it would appear that they are relying upon a notification bearing No.1342 dated 21.12.2015 which was issued under the Bihar Excise Act, 1915 including its Amendment Acts called Bihar Excise (Amendment) Act, which came into force from time to time. It is pointed out that on the date of seizure i.e. on 6.5.2016, the Excise Case No.184 of 2016 was registered under the provisions of the Bihar Excise (Amendment) Act, 2016, but the said Bihar Excise (Amendment) Act, 2016 has been held to be ultra vires by Division Bench of this Court and the matter is presently subjudice before the Hon'ble Supreme Court of India. It is submitted that the confiscation proceeding registered under the old Prohibition Act, which has already been held ultra vires was not fit to proceed.

9. Having heard learned counsel for the petitioners and

learned counsel representing respondent no.3, we are of the considered opinion that the order of confiscation as contained in Annexure-6 passed by the Collector-Cum-District Magistrate, Kishanganj as also the appellate order passed by the Excise Commissioner, Bihar, Patna are liable to be set aside. We are constrained to take this view, for the simple reason that the genuineness of the documents in form of Invoice and the copies of the consignment notes issued in the name of the petitioner no.2 by petitioner no.1 are not in dispute and they are found to be genuine. Copy of the transport pass for the transport of duty free or duty paid packaged foreign liquor and Lorry Challan showing the vehicle no. are all genuine documents. In the counter affidavit/supplementary counter affidavit, the respondent no.3 has admitted that during verification, the report of Government of West Bengal, Excise Department dated 17.6.2016 has also been found to be correct. The respondent admits that the number of export and import permit was mentioned in the said Invoice. If the Invoice has mentioned the Export and Import permit numbers and the said Invoice has been found to be correct, in our opinion, confiscation of the goods and vehicle only for not carrying the valid excise import and export pass even though the petitioners were carrying transport pass along with consignment cannot be said to be proper exercise of power by the Collector –cum-

District Magistrate, Kishanganj.

10. At this stage, we take a glance over the relevant provisions of the Prohibition Act, 2016, which has come into force with effect from 2nd October, 2016. According to Section 98(2) which is the repeal and savings provisions under the Prohibition Act, notwithstanding repeal of the Bihar Excise Act, 1915 and the Amendment Act mentioned under Sub Clause (1) of Section 98 anything done or any action taken in the said Act shall be deemed to have been done or taken in the corresponding provisions of the Act. The order of confiscation has been passed by the Collector-Cum-District Magistrate, Kishanganj in exercise of his powers under Section 58 of the Prohibition Act. We quote Sections 56, 57 and 58 of the Prohibition Act, 2016 for ready reference :

> ["**56. Things liable for confiscation.**- Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation, namely----
>
> (a) any intoxicant, liquor, material, still, utensil, implement, apparatus in respect of or by means of which such offence has been committed;
>
> (b) any intoxicant or liquor unlawfully imported, transported, manufactured,

sold or brought along with or in addition to, any intoxicant, liable to confiscation under clause (a);

(c) Any receptacle, package, or covering in which anything liable to confiscation under clause (a) or clause (b), is found, and the other contents, if any, of such receptacle, package or covering;

(d) Any animal, vehicle, vessel or other conveyance used for carrying the same.

(e) Any premises or part thereof that may have been used for storing or manufacturing any liquor or intoxicant or for committing any other offence under this Act.

Explanation.--- The word "premises" include the immoveable structure, all moveable items within the structure and the land on which the premises is situated.

[57. Power of Collector, etc., to order, sale or destruction of articles before confiscation.— If the article in question is liable to speedy and natural decay, or if the Excise Commissioner, Collector, Court or the officer authorized by the

State Government in this behalf is of opinion that the sale would be in public interest or the sale would be for the benefit of the owner, the Excise Commissioner, Collector, Court or the officer may, at any time, before passing the Order of confiscation, direct such articles to be sold and proceeds be deposited with the Government:

Provided that, where anything is liable to speedy and natural decay, or is of trifling value or which can be put to misuse, the Collector or the officer concerned, may, order such thing to be destroyed, if in its or his opinion such order is expedient in the circumstances of the case.

[58. Confiscation by District Collector.- (1) Notwithstanding anything contained in this Act or any other law for the time being in force, where anything liable for confiscation under this Act is seized or detained under the provisions of this Act, the officer seizing and detaining such property shall, without any reasonable delay submit a report to the District Collector who has jurisdiction over the said area;”

11. A bare perusal of Section 56 of the Prohibition Act, 2016 would show that whenever an offence has been committed which is punishable under this Act the things mentioned under Clause (a), (b), (c), (d) and (e) are liable to be confiscated. It is not the case of the respondent no.3 that the 550 Cartoons which were seized along with the Truck in question are the things in respect of which an offence has been committed. The stand in the counter affidavit is that the Transporter was not carrying the copy of the valid export/import permit and it was not digitally locked but there is no denial of the fact that the Invoice which are part of the records duly mentioned the export/import permit number and in course of confiscation proceeding, the District Magistrate-Cum-Collector has not held that the said import permit number and export permit number are falsely and wrongly recorded.

12. The discrepancy found in the total bulk liters recorded in the Invoice and the seizure list has been made another ground for confiscation of the entire consignment which in our opinion cannot be approved. So far as the materials which have been seized and confiscated are concerned, those are very much covered under the Invoice and the transport pass and in case any short fall has

been found in the quantity mentioned in the Invoice and that of the seizure list, the same may be a matter to be considered separately to find out whether the short fall has occasioned due to any criminal intent, as alleged by the respondent no.3, but the consignment which has been seized and confiscated in the present case, in the opinion of this Court have been wrongly confiscated if not seized on the ground of shortage of quantity in the seizure list.

13. It is not the case of respondent no.3 that the vehicle was found loaded with more quantity of IMFL than the quantity mentioned in the Invoice and the transport pass rather it is a case where the quantity loaded on the Truck was a little less than the quantity mentioned in the Invoice. In the facts of the present case, it cannot be said that liquor were being unlawfully transported or sold. We also take note of the specific submission which has not been denied by the respondent no.3 that this was the only route for transit from one State to another. We also find force in the submission of learned counsel for the petitioners that in case the vehicle plying on the National Highway en route to West Bengal via the territories of the State of Bihar was required to be digitally locked and that facility was available at Farig Gola Check Post then it was the concerned authorities of the State of Bihar to provide the digital lock otherwise in absence of any prima facie proof of fact that the petitioners had

entered in any illegal transaction of sale of liquor inside the State territory the vehicle and the entire consignment in question can not be allowed to be confiscated.

14. So far as the submission of the learned counsel regarding the alternative remedy is concerned, we are of the view that the petitioners had availed the right of first appeal before the Commissioner of Excise and then finding that both the authorities have taken a per versed view in complete violation of law moved this Court in its writ jurisdiction rather than preferring a second appeal before the State Government. It is well settled that principle of alternative remedy is a rule of convenience and not a rule of law. In an appropriate case, this Court in exercise of its' extraordinary writ jurisdiction under Article 226 of the Constitution of India may be inclined to entertain a writ application without relegating the petitioners back to the statutory remedy. We find it a fit case to entertain the writ application and have accordingly exercised our extraordinary power of writ jurisdiction in the present case.

15. In view of discussions above, both the impugned orders as contained in Annexures 6 and 9 are hereby set aside and the writ application is allowed. The respondents are directed to release the truck bearing No. WB-51A/7310 as well as the 550 Cartoons of

whisky which was the subject matter of confiscation within a period of one week from the date of receipt/production of a copy of this order.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

N.H./-

AFR	AFR
CAV DATE	N/A
Uploading Date	29-03-2018
Transmission Date	