IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.36168 of 2019

Arising Out of PS. Case No.-124 Year-2018 Thana- MAGADH UNIVERSITY District- Gaya

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Kailu Mian @ Murtuja Alam Son of Muslim Mian Resident of Village - Moula Nagar, P.S.- Magadh University, Distt - Gaya.

... ... Petitioner/s

Versus

The State of Bihar

... ... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Anil Kumar Saxena

For the Opposite Party/s : Mr. Mritunjay Kumar Nirala

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH

ORAL ORDER

3 11-06-2020 The matter has been taken up through virtual court proceeding.

Heard learned counsels for the petitioner and the State.

The present application has been filed with a prayer for bail in a case registered for the offences punishable under Section 30(d) of the Bihar Prohibition and Excise Act, 2016, as amended by Amendment Act 8 of 2018, hereinafter referred to as ‘the Act, 2016’.

A bench of this Court, vide order dated 10.06.2019, granted provisional bail to the petitioner who was in custody since 26.04.2019 and further directed the matter to be listed after disposal of S.L.P. (C) Nos. 27949-29763 of 2016, wherein the vires of the Bihar Excise Act, 1915 and the Bihar Prohibition and Excise Act, 2016 is under challenge. The relevant portion of the order reads as follows:-

> "Recently, the Full Bench of this Court in a case i.e. Criminal Appeal (SJ) No. 431 of 2019 (Ram Vinay Yadav vs. The State of Bihar) has noticed that vires of entire Excise Act as well as amended Excise Act is pending before the Hon'ble Supreme Court.
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> The Court is of opinion that since vires of entire Excise Act is already sub-judice before the Hon'ble Supreme Court, it would not be appropriate for this court to finally dispose of any case pertaining to Excise Act, 2016. However, at the same time, it would not be appropriate to allow a person to remain in custody for an indefinite period.
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> List this matter after disposal of S.L.P. (C) Nos. 27949-29763 of 2016 and connected writ petitions pending before the Hon'ble Supreme Court.
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> Till further order, the petitioner namely, Kailu Mian @ Murtuja Alam is directed to be released provisionally on bail on furnishing bail bond of Rs. 10,000/- (ten thousand) with two sureties of the like amount each to the satisfaction of learned Special Excise Judge, Gaya/concerned court in connection with Magadh University P.S. Case No. 124 of 2018."

Due to present pandemic, Covid-19, the physical court proceedings in the Supreme Court are not being conducted, as a result, there is no likelihood of the aforementioned S.L.P. being disposed of in near future. Hence, on a joint prayer of the parties, the application has been heard on merits.

Accordingly, the order dated 10.06.2019 stands modified to the extent of placing the matter after disposal of aforementioned S.L.P.

As per the prosecution case, 1000 Kg of Mahua flower was recovered from the house of the petitioner.

It is submitted by learned counsel for the petitioner that even assuming the accusation to be true, the case under Section 30(d) of the Act is not made out against the petitioner. A statement has been made in paragraph no.3 of the petition that the petitioner is not having any criminal antecedent. It is further submitted that there is nothing on record to suggest that the petitioner has misused the privilege of provisional bail.

Learned APP submits that recovery has been made from the house of the petitioner.

From the rival submissions of the parties, this is not in dispute that in the present case, 1000 kilograms Mahua has been recovered from the house of the petitioner. The possession, transportation and use of Mahua flower are governed by the

Bihar Excise (Mahua Flowers) Rules, 2006 (hereinafter referred to as the Rules, 2006) made in exercise of the powers conferred by Section 89 of the Bihar Excise Act, 1915. Though by coming into force of the Act, 2016, the Bihar Excise Act, 1915 has been repealed by virtue of the repealing provision incorporated in Section 98 of the Bihar Prohibition and Excise Act, 2016 (hereinafter referred to as the Act, 2016, which reads as follows:

> “**98. Repeal and Savings.**—(1) The Bihar Excise Act, 1915 (Bihar and Orissa Act II of 1915) including its amending Acts called Bihar Excise (Amendment) Act, 1973, Bihar Excise (Amending & Validating) Act, 1981, Bihar and Orissa Excise (Amendment) Act, 1985, and the Bihar Excise (Amending and Validating) Act, 1995, and the Bihar Excise (Amendment) Act, 2016 (Act 3 of 2016)along with the Bihar Prohibition Act, 1938 (6 of 1938), are hereby repealed.
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> (2) Notwithstanding such repeal, anything done or any action taken under the said Act shall be deemed to have been done or taken under the corresponding provisions of this Act.
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> (3) All references in any enactment to any of the provisions of the Act so repealed shall be construed as references to the corresponding provisions of this Act.
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> (4) All proceedings (including proceedings by way of investigations) pending

> before any Officer, Authority or Court, immediately before the commencement of this Act shall on such commencement be deemed to be proceedings pending before it as per this Act and shall continue to be dealt with accordingly."

The above quoted provision does not suggest that the Rules, 2006 has been repealed, rather the saving provision of Section 97 of the Act, 2016 saves the Rules, 2006. Section 97 of the Act, 2016 reads as follows:

> "**97. Orders to remain in force.—** (1) Every order, notification , rule or regulation which was made under the Bihar Excise Act, 1915(Bihar and Orissa Act II of 1915), Bihar Excise (Amendment) Act, 1973, Bihar Excise (Amending & Validating) Act, 1981, Bihar and Orissa Excise (Amendment) Act, 1985, and the Bihar Excise (Amending and Validating) Act, 1995, Bihar Excise (Amendment) Act, 2016 (Bihar Act 3 of 2016), Bihar Prohibition Act, 1938 (Act 6 of 1938) by the State of Bihar or by the Excise Commissioner, Collector, the Board or any other Excise Officer appointed under those enactments, relating to the matter of Excise and which was in force immediately before the expiration thereof shall, in so far as such order or notification or rule or regulation is not inconsistent with the provisions of this Act, be deemed to continue in force and to

have been made under this Act."

Rule 3 of the Rules, 2006 deals with the possession of Mahua flowers, which reads as follows:

> "3. Possession of *Mahua* Flowers.- No person other than a person duly authorised by the person holding a licence for the collection of *Mahua* flowers, one of the bases of country liquor, shall collect or possess more than ***five kilogram*** of *mahua* flowers without a licence granted under these Rules."

The above quoted rule suggests that no person can possess more than five kilogram Mahua flower without a licence granted under these Rules. The licence is granted for possession of Mahua flowers under Rule 4 of Rules, 2006 whereas Rule 5 stipulates the issuance of licence for possession and sale.

In view of the above facts, it is clear that the possession of Mahua flower does not come within the purview of the Act, 2016 though Rule 3 of Rules, 2006 mandates the possession of only five kilogram Mahua flower without licence but the said Rule does not provide a penal provision, if a person possesses more than 5 kilogram of Mahua flower.

Clause (16) of Section 2 of the Act, 2016 defines 'country or traditional liquor' which reads as follows:

> "2. **Definitions.-** In this Act, unless otherwise required in the context
> ……
> (16) ***"country or traditional liquor"*** means
> - plain or spiced spirit made from mahua, rice, gur, molasses or grains;or
> - plain or spiced spirit made from silent spirit or extra neutral alcohol; or
> - Tari, or
> - all fermented liquors, including pachwai, made from mahua, rice , millet or other grains according to native processes."

The above quoted provision defining country or traditional liquor under Clause (16) of Section 2 of the Act, 2016 suggests that unless the plain or spiced spirit is made from Mahua or fermented liquor or Pachwai is distilled from Mahua, it cannot be treated as country or traditional liquor to come within the purview of the Act, 2016.

Clause (40) of Section 2 of the Act, 2016 defines 'intoxicant', which reads as follows:-.

> "2(40) *"intoxicant"* means -
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> (i) liquor, or
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> (ii) Spirit including silent spirit or ENA, or
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> (iii) Methyl Alcohol, or
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> (iv) Ethanol, whether denatured or not; or
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> (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) Acts, 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."

Sub-clause (viii) of Clause (40) of Section 2 of the Act, 2016 suggests that 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 as a substitute for alcohol and is used or consumed for the purposes of getting intoxicated. Sub-clause (v) of Clause (40) of Section 2 of the Act, 2016 suggests that 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 entoxicant for the purpose of this Act.

No doubt, liquor can be distilled from Mahua flower but in order to bring Mahua flower within the ambit of intoxicant simultaneously a notification has to be made in Official Gazette by the State Government. There is no such notification on record till date. There is no allegation in the FIR that Mahua flower was being kept for distilling it for being used as distilled liquor.

The issue whether Mahua flower comes within the purview of the Act, 2016, came to be considered when confiscation proceeding was initiated on seizure of Mahua flower under Act, 2016 in the case of Umesh Kumar @ Umesh Mahto Vs. The State of Bihar and Ors. (CWJC No. 23163 of 2018 and its analogous cases), wherein a Division bench of this Court came to a conclusive finding that mere possession of Mahua flower does not bring the same within the purview of 'country or traditional' liquor under Section 2(16) or 'intoxicant' under Section 2(40) of the Act, 2016 unless it is being used for converting into spirit or liquor.

In the present case, the Mahua flower has been seized from the house of the petitioner. Presumption of commission of the offence under the Excise Act, 2016 is stipulated in Section 32, which reads as follows:-

> "32. **Presumption as to commission of offence in certain cases.** - (1) In prosecution of an offence under this Act, the accused person would have to account for the possession of any liquor, intoxicant, material, utensil, implement or apparatus involved in manufacture or storage of such liquor.
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> (2) In the event of a failure to offer a satisfactory explanation, there shall be a presumption that the accused person is guilty of the commission of such offence, unless proved otherwise.
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> (3) Where any equipment, machinery,

> animal, vessel, cart, vehicle, conveyance or any premises are used in the commission of an offence under this Act, and are liable to confiscation and/or liable to be sealed, the owner or occupier thereof would need to account satisfactorily, and in the absence of a satisfactory explanation the presumption that accused person committed the offence shall arise, unless proved otherwise."

Section 32(1)(2) of above quoted provision suggests that if the accused fails to account for the possession of any liquor, intoxicant, material, utensil, implement or apparatus involved in manufacture or storage of such liquor, then the presumption of guilt of the commission of offence under the Act, 2016 can be drawn, but in the case of possession of Mahua flower, no such presumption can be drawn.

Considering the fact that 1000 kilogram Mahua flower was recovered from the house of the petitioner but there is no accusation that it was stored for distilling it as liquor or spirit to bring it within the purview of country made liquor or intoxicant under Section 2(16) or 2(40) of the Act, 2016 and none of the ingredients of Section 30(d) of the Act are attracted, coupled with the fact that there is nothing on record to suggest that the petitioner has misused the privilege of provisional bail, hence, the provisional bail, granted to the petitioner vide order dated 10.06.2019 in connection with Magadh University P.S. Case No. 124 of 2018, pending in the Court of learned Special Excise Judge, Gaya, is hereby confirmed.

The present application is disposed of.

(Dinesh Kumar Singh, J)

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