

GAHC010003762022



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

Case No. : WP(C)/199/2022

M/S SHIVA BOTTLES PVT LTD AND ANR

2: PRAG RAJ SINGLA

...Petitioners.

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
EXCISE DEPTT. DISPUR, GUWAHATI-6

2:THE COMMISSIONER OF EXCISE
ASSAM
HOUSEFED COMPLEX
DISPUR
GUWAHATI-781006

3:THE ADDITIONAL COMMISSIONER OF EXCISE
ASSAM
HOUSEFED COMPLEX
DISPUR
GUWAHATI-781006

4:THE DEPUTY COMMISSIONER
KAMRUP (M)
GUWAHATI-1

5:THE SUPERINTENDENT OF EXCISE
KAMRUP (M)
GUWAHATI-

.....Respondents.

BEFORE

HON'BLE MR. JUSTICE DEVASHIS BARUAH

For the Petitioners : Mr. K.N. Choudhury, Senior Advocate.
Mr. R.M. Deka. ... Advocate

For the respondents : Mr. P.N. Goswami Sr. SC, Excise.

Date of hearing & judgment : 02.02.2022

JUDGMENT AND ORDER (ORAL)

Heard Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. R.M. Deka, learned counsel for the Petitioners. I have also heard Mr. P.N. Goswami, learned Senior Standing Counsel, Excise Department.

2. The Petitioners by way of the instant writ petition challenges the action of the respondent authorities of closure/sealing of the bottle manufacturing factory of the Petitioners and to pass consequential orders in respect thereto. The case of the Petitioners is that the Petitioner No.1 is a Private Limited Company and is engaged in the

business of manufacturing of bottles and caps and for that purpose have a factory at Patarkuchi, Sonapur. The products manufactured by the Petitioner Company i.e. PET bottles, caps and aluminium caps are supplied to various Industries such as FMCG, Pharmaceutical and Liquor Manufacturers across all North Eastern States. It is an admitted fact that the Petitioner No.2 is one of the Directors of the Petitioner Company and also an authorized signatory of M/s Shiva Beverages Private Limited, which is a Liquor Manufacturing Company and the son of the Petitioner No.2 is the licensee of the said Manufacturing Company. The Petitioner Company in course of its business also provides bottles and caps to M/s Shiva Beverages Private Limited. It appears from the materials on record that M/s Shiva Bottles Private Limited has its factory at Patarkuchi, Sonapur whereas the factory premises of M/s Shiva Beverages Private Limited at Kendubam, Khetri, Kamrup (M) District.

3. On 09.12.2021 at about 10:20 p.m. the Inspector of Excise on the tip of secret information under the direct supervision of Superintendent Excise, Kamrup (M) conducted a sudden raid/search, at the factory premises of of M/s Shiva Beverages Private Limited at Kendubam, Khetri and found two employees namely Dhiraj Deka and one Sanjib Das present at the licenced premises. During search operation, as per the Forwarding Report dated 10.12.2021 encloses as Annexure-C to the writ petition, various objectionable materials and liquor were found in the licenced premises which were not allowed under the Excise Act and Rules and the same were recovered and seized and in respect thereof a Seizure Memo was also made. A case was also registered being Case No.

SNP/Ex.24/2021 under Section 53(1)(a)(c)(d) & (e) and Section 54 of the Assam Excise Act, 2020 (for short 'the Act of 2020'). In the Forwarding Report it was further alleged that the arrested employee Dhiraj Deka in his statement stated that the illegal trade was being carried out by one Tushar Singla, who was the licensee of the licenced premises. The Seizure List which was marked as M.R. No.324/2021 was enclosed to the said Forwarding Report and a perusal of the said Seizure List would show the seized articles and quantity mentioned therein.

4. Almost simultaneously on 10.12.2021 at about 1:46 a.m. a sudden raid/search was conducted in the premises of "Shiva Group of Industries" and more particularly in the factory of the Petitioner Company located at Patarkuchi, Sonapur. In terms with the Forwarding Report dated 10.12.2021 enclosed as Annexure-A to the writ petition, it has been alleged that during the search operation huge quantity of objectionable materials and IMFL of various brands and sizes were also recovered and seized. The seized liquor and other objectionable materials such as fake holograms, labels, bottle caps were then eventually entered in the Seizure Memo. The person in-charge who was the custodian of the seized exhibits, one Nirsing Mushahary was arrested and as per the said Forwarding Report it has been alleged that the said Nirsing Mushahary had revealed that the main person behind the illegal trade is the Petitioner No.2, who happens to be owner of the property. The Seizure List which has been marked as M.R. No.325/2021 was enclosed to the Forwarding Report. At this stage, it would be relevant to take note of that in both the Forwarding Reports enclosed as Annexure-A and Annexure-C to the writ petition, it would be seen that

the Inspector of Excise, Sonapur Circle submitted the Forwarding Reports and had categorically mentioned that all the objectionable materials and the liquor were seized entered in the respective Seizure Memo. Be it mentioned that case was registered being SNP/Ex.25/2021 under Section 53(1)(a)(c)(d) & (e) of the Act of 2020

5. Subsequent thereto, a Show-Cause Notice was issued to the licensee of M/s Shiva Beverages Private Limited to submit a reply as regards the alleged violations mentioned in the said Show-Cause Notice. The record further reveals that the licensee of M/s Shiva Beverages Private Limited had sought for an extension of time to file a reply. Subsequent thereto, a communication was issued on 20.12.2021 addressed to one Sri Tushar Singla, the licensee of M/s Shiva Beverages Private Limited to appear before the Commissioner of Excise and Licencing Authority with a written reply to the said communication and show cause as to why the licences issued in favour of Tushar Singla, of M/s Shiva Beverages Private Limited should not be cancelled and why actions as provided under law should not be initiated. The records further reveals that to the said Notice dated 20.12.2021, the licensee of M/s Shiva Beverages Private Limited sought for extension of time of 15 (fifteen) days to submit an effective reply.

6. In the meantime, while the aforesaid Show-Cause Notices were being issued the licenced premises of M/s Shiva Beverages Private Limited was sealed by the Excise Authority on 13.12.2021. This writ petition however is not in relation to the sealing of the licenced premises

of M/s Shiva Beverages Private Limited but the Petitioners grievance in the instant writ petition is that on the same day i.e. 13.12.2021, the factory premises of the Petitioner Company was also sealed by the Excise Authority and it is against the said action of sealing the factory premises of the Petitioner Company, the Petitioners have approached this Court under Article 226 of the Constitution of India.

7. An affidavit-in-opposition was filed by the Respondent Nos.2, 3 and 5 to the said writ petition and soft copy of the same was placed by the learned Senior Standing Counsel, Excise Department during the course of hearing. In the said affidavit-in-opposition, it is mentioned that on 08.12.2021 Basistha Police Station seized 860 cases of IMFL without having any valid permit or authorization from a vehicle owned by the Petitioner No.2 and thereupon after getting secret information raids were conducted in the premises of both M/s Shiva Beverages Private Limited located at Kendubam, Khetri as well as the Petitioner Company's factory at Patarkuchi, Sonapur. Various objectionable materials were found including illegal liquor which were seized and on the basis thereof two Seizure Lists were prepared and in respect to the seizure made in the factories of both M/s Shiva Beverages Private Limited and M/s Shiva Bottles Private Limited. Subsequent thereto on 11.12.2021 the Inspector of Excise requested the Superintendent of Excise, Kamrup (M), Guwahati to seal the premises of both the units in order to restrict the owner/proprietor/licencee to enter inside the premises and tamper with important documentary evidence. Consequently, the Superintendent of Excise, Kamrup (M), Guwahati on 11.12.2021 forwarded such request to the Deputy Commissioner,

Kamrup (M), Guwahati and requested to accord necessary permission for sealing of the above two premises and to depute one Magistrate for that purpose. Upon being approved and authorized on 13.12.2021 the factory premises of the Petitioner Company was sealed in presence of the Magistrate as well as other Excise and Police officials. To the said effect, Annexure-G, Annexure-H and Annexure-I has been enclosed to the said affidavit-in-opposition. In the said affidavit-in-opposition it has been further mentioned that the relief sought for in the writ petition ought not to be granted as it would hamper the investigation. It was also mentioned that considering the voluminous materials lying in the factory unit of the Petitioner Company, as the same could not be seized entirely and taken out of the premises and as such till conclusion of the investigation and seizure of all materials, this Court ought not to issue a direction for de-sealing of the factory premises of M/s Shiva Bottles Private Limited.

8. At this stage it may also relevant to take note of the veracity of the contents of paragraph no.7 of the affidavit-in-opposition wherein it is mentioned that the voluminous materials lying in the office premises of the Petitioner Company and as such same could not be seized entirely and taken out of the premises which on the face of it is contrary to the statements made in the Forwarding Report wherein it has been categorically mentioned that liquor as well as the objectionable materials have been seized and entered into the Seizure Memo.

9. Be that as it may, the issue which arises for consideration in the instant writ petition is as to whether the Excise Department or any

Authority under the Act of 2018 as well as the Rules framed therein under has the authority to seal the factory premises of the Petitioners which admittedly is not a premises engaged in the manufacture, possession and sale of liquor as defined in Section 2(q) of the Assam Excise Act, 2000 (for short the Act of 2000'). For the purpose of answering the said question it would be relevant to take note of the powers of the Excise officials in so far as the sealing/closure of a premises of the Petitioner Company.

10. Section 37 of the Act of 2000 empowers the officials mentioned therein to enter and inspect at any time by day or night any place in which any licenced manufacturer carries on manufacture of or store any intoxicant and any place in which any intoxicant kept for sale by licenced person and may examine accounts and registers and may examine, test, measure or weight any measures, weights, testing instruments, materials, stills, utensils, implements apparatus or intoxicant found in such place. So the power in terms of Section 37 of the Act of 2000 is to make inspection is in respect to a place where any licence manufacturer who carries on the manufacture of or store any intoxicant and any place in which any intoxicant kept for sale by licenced person.

11. Section 38 relates to the power given to the official concerned as regards to carry out arrest, seizure and search without warrant. Sub-clause (a), (b) and (c) of Sub-Section (4) of Section 38 empowers that in any public place any Excise or Police Officer may exercise such powers

stipulated in the said three sub-clauses of Sub-Section (4) of Section 38. While the sub-clause (a) stipulates the power to arrest without warrant any person found committing an offence punishable under Section 53 or Section 54; sub-clause (b) empowers seizure, detention and carry away any excisable or other article which the Excise or the Police Officer has reasons to believe to be liable to confiscation under the Act of 2000 or any other law for the time being in force relating to excise revenue or any document or articles which the said Excise or Police Officer has reasons to believe may furnish evidence of the commission of an offence punishable under the Act of 2000 or under the Assam Opium Prohibition Act, 1947, Assam Ganja and Bhang Prohibition Act, 1959 and Narcotic Drugs and Psychotropic Substances Act, 1985 and sub-clause (c) empowers in Excise or Police Officer to detain and search any person upon whom any vessel, raft, vehicle, animal, package, receptacle cause to suspect any such article to be. But relevant to take note of that such power can be exercised without warrant in any public place only.

12. It is also relevant herein to take note of that while Section 37 permits the officials as mentioned therein to enter and inspect at any time by day or night any place in which any licenced manufacturer carries on manufacture of or store any intoxicant and any place in which any intoxicant kept for sale by a licenced person, Section 39 stipulates the necessity of issuance of a warrant upon an opinion being formed by the Collector or the Magistrate to the effect that he has reasons to believe that an offence punishable under Section 53, 54, 55, 56, 57 or 61 has been or is likely to be committed for search of any place that any intoxicant, still, utensil, implement, apparatus or

materials in respect of which such offence has been or is likely to be committed, are kept or concealed and for arrest of any person whom the Collector or the Magistrate has reasons to believe to have been or to be likely to be engaged in the commission of any such offence. The apparent distinction of Section 37 and 39 of the Act of 2000 makes it clear that while inspection in respect of licenced premises or licenced persons the inspection can be carried out by the officials mentioned in Section 37 of the Act of 2000 but in respect of search of any place or arrest of any person, there is a necessity of issuance of a warrant by the Collector or the Magistrate, who before issuance of the warrant has reasons to believe that an offence punishable under Section 53, 54, 55, 56, 57 or 61 has been or is likely to be committed. Section 40 empowers the Collector or the Magistrate at any time search or direct a search to be made in his presence as well as arrest or direct the arrest in his presence. Section 41 of the Act of 2000 applies to search, seizure and arrest following upon entry without warrant in emergent cases. The said Section is quoted hereinbelow for the sake of convenience :

“41. Search, seizure and arrest following upon entry without warrant, in emergent cases- Any Excise or Police Officer, not below such rank as the State Government may, by notification, prescribe, having reason to believe and having recorded the grounds of his belief that an offence under Sections 53, 54, 55, 56, 57 or 61 has been, is being or is likely to be, committed in any place and that a search cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence, may at any time by day or night—

(a) enter into and search such place;

(b) seize and carry away anything found therein which he has reason to believe to be liable to confiscation under this Act or any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under

this Act or under the Assam Opium Prohibition Act, 1947 (Assam Act 23 of 1947), Assam Ganja and Bhang Prohibition Act, 1959 (Assam Act 21 of 1959) and the Narcotic Drugs and Psychotropic Substances Act, 1985 (Central Act 61 of 1985) and detain and search and if he thinks proper, arrest any person found in such place whom he has reason to believe to have committed any such offence as aforesaid.”

13. A reading of Section 41 would show that in case of emergent cases, the necessity of issuance of warrant or search or arrest in presence of the Collector of the Magistrate stands dispensed with if any Excise or Police Officer not below such rank as the State Government may by notification prescribe have reasons to believe and having recorded the grounds of his belief that an offence under Section 53, 54, 55, 56, 57 or 61 has been or is being or is likely to be committed in any place and that a search cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence may at any time by day or night enter into and search such place as well as seize and carry away anything found therein which such Officer has reasons to believe to be liable to confiscation under the Act of 2000 or any document or other articles which he has reasons to believe may furnish evidence of the commission of an offence punishable under the Act of 2000 or under the Assam Opium Prohibition Act, 1947, Assam Ganja and Bhang Prohibition Act, 1959 and the Narcotic Drugs and Psychotropic Substances Act, 1985 and detain and search and if he thinks proper, arrest any person found in such place whom he has reasons to believe to have committed any such offence as aforesaid. It needs to be bear in mind that the said emergency powers which dispenses with the requirement of Section 39 and 40 can only be

exercised upon the formation of the opinion on the basis of the belief that an offence under Section 53, 54, 55, 56, 57 or 61 has been or is being or is likely to be committed in any case and that a search cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence and this belief has to be recorded. It is no longer *res integra* that in absence of such formation of belief and recording thereof such Excise or Police Officer would not have the authority or jurisdiction to carry out the emergency powers mentioned in Section 41.

14. Section 44 and 45 as it relates to effect and consequences of a seizure being made in respect to the articles which also has a relevance in view of the specific stand taken by the respondent authorities in their affidavit is quoted hereinbelow :

“44. Production of persons arrested or article seized - *Article seized and, unless security for their appearance before the Collector be taken, persons arrested under the warrant of a Collector shall be produced before such Collector.*

(2) Article seized under the provisions of Sections 38 and 41 and persons arrested under the said provisions by persons or officers not empowered to accept bail shall be produced or forwarded to—

(a) the Collector or other officer empowered under Section 42 to investigate the case, or

(b) an excise officer empowered under Section 49 to accept bail, or

(c) the officer-in-charge of the nearest police station whoever is nearest.

(3) When a person arrested is produced before an Excise Officer empowered under Section 49 to accept bail, before an officer-in-charge of a police station, such officer shall forward such person to or take security for his appearance before Collector or other officer empowered under

Section 42 to investigate the case.

(4) When articles seized cannot be conveniently conveyed before the officer specified in sub-sections (1) and (2) the persons making the seizure shall keep of them in some place of safety and forthwith report the seizure to such officer.

45. Police custody of articles seized –

(1) All Officer-in-charge of a Police Station shall take charge of and keep in safe custody, pending the order of a Collector or other Officer empowered under Section 42 to investigate the case, all articles seized under this Act which may accompany such articles to the Police Station or may be deputed for the purpose of an official superior to affix his seal to such articles and to take samples of and from them.

(2) All samples so taken shall also be sealed with the Seal of the officer-in-charge of the Police Station.”

15. For the purpose of the instant writ petition it is relevant to take note that the articles seized in terms with Sub-Section (2) of Section 44 are to be produced or forwarded to the officers mentioned in sub-clause (a), (b) and (c) of that Sub-Section. Sub-Section (4) of Section 44 stipulates that when the articles seized cannot be conveniently conveyed before the officers specified in sub-section (1) and sub-section (2) the persons making the seizure shall keep of them in some place of safety and forthwith report the seizure to such officers. Section 45 empowers all Officers-in-Charge of a Police Station to take charge of and keep in safe custody, pending the orders of a Collector or other Officers empowered under Section 42 to investigate the case, all articles seized under this Act which may accompany such articles to the Police Station or may be deputed for the purpose of an official superior to affix his seal to such articles and to take samples of and from them. It is the mandate Sub-Section (2) of Section 45 that all samples so taken shall also be

sealed with the Seal of the officer-in-charge of the Police Station.

16. To sum up the officers mentioned in Section 37 has the power to enter and inspect at any time by day or night any place in which any licenced manufacturer carries on the manufacture of or store any intoxicant and any place in which any intoxicant kept for sale by licensed person. The power to search any place or arrest any person has to be done on the basis of Section 39 and 40 of the Act of 2000. However, in emergent cases any Excise Officer or Police Officer not below the rank as the State Government by notification prescribe subject to formation and an opinion that an offence under Section 53, 54, 55, 56, 57 or 61 has been or is being or is likely to be committed in any place and that a search cannot be obtained without affording the offender an opportunity of escaping or of concealing evidence of the offence and thereupon recording the said grounds of belief exercise the powers under Section 41 by such officer. Section 44 and 45 stipulates how and in what manner the articles seized is to be produced, forwarded and kept. Apparently, a perusal of the said provisions do not show that there is power to seal/close any premises be it licenced or any other place.

17. In the backdrop of the above, the stand of the respondent authorities before this Court in their affidavit-in-opposition is required to be taken into consideration. From the affidavit-in-opposition as well as the Forwarding Report in so far as the Petitioners' factory premises is concerned reveals that the Inspector of Excise under the direct

supervision of the Superintendent of Excise, Kamrup (M) and the Deputy Commissioner, Enforcement, Kamrup(M) conducted a sudden raid/search in the Petitioners' factory premises at Sonapur. It further reveals that the said raid/search was carried out in presence of one Sanjib Kumar Medhi, Additional Commissioner (In-charge), Excise, Assam, Sri L.N. Baruah, Deputy Commissioner, Excise, Assam and Sri Pranjali Borah, Deputy Commissioner, Excise, Assam. From a perusal of the affidavit-in-opposition as well as the Forwarding Report it reveals that the concerned respondent authorities had exercised the powers under Section 41 of the Act of 2000. But however as to whether the mandate of Section 41 has been complied or not or formation of the reasons to believe and recording the grounds thereof has been complied or not is not indicated both in the affidavit-in-opposition or in the Forwarding Report.

18. Be that as it may, as the question involved in the instant proceedings relates to as to whether the respondent authorities has the power to seal the Petitioners' factory, it would be relevant to take note of that the Act of 2000 and the provisions thereof as already discussed hereinabove do not in any manner disclose that the respondent Excise Department or any officials acting within the powers of the Act of 2000 has the authority or the jurisdiction to seal the Petitioner factory which is engaged in the business of manufacturing PET bottles, caps and aluminium caps. Consequently, the action of the respondent authorities to seal/close the Petitioner factory being without any authority and jurisdiction, the said action of the respondent authorities of sealing/closing the premises of the Petitioner Company on 13.12.2021

at 6:30 p.m. is interfered with immediate effect.

19. Now the question further arises in view of the stand of the respondent authorities that voluminous materials are lying in the office premises of the Petitioner Unit and same could not be seized entirely and taken out of the premises are contrary to the Forwarding Report dated 10.12.2021 made by the Inspector of Excise who categorically stated that “during search operation huge quantity of objectionable materials and IMFL of various brands and sizes were also recovered and seized. The seized liquor and other objectionable materials such as fake holograms, labels, bottle caps were then eventually entered in the Seizure Memo”. Further to that, Section 44 and 45 of the Act of 2000 clearly mandates the manner in which the seized articles are to be dealt with and in view of the mandate therein coupled with the contents of the Forwarding Report dated 10.12.2021, this Court is of the opinion that interfering with the sealing/closing of the Petitioners’ factory premises would not effect or hamper the investigation so carried out.

20. Consequently the instant writ petition stands allowed. However no cost.

JUDGE

Comparing Assistant