

# Mukesh Kumar vs The State Of Bihar Through The Director ... on 9 February, 2022

**Author: Ashutosh Kumar**

**Bench: Ashutosh Kumar**

IN THE HIGH COURT OF JUDICATURE AT PATNA  
Criminal Writ Jurisdiction Case No.89 of 2021  
Arising Out of PS. Case No.-265 Year-2020 Thana- MADHUBANI TOWN District-  
Madhubani

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United Breweries Limited, A registered company incorporated under the Companies Act, 1956 having Its Registered office at U.B. Towers, U.B. City No. 24, Vittal Mallya Road, Bangalore- 560001 and factory at Plot No. A 1, Industrial Area, Kopakala, P.S. - Naubatpur, District - Patna through Amarish Kumar Singh aged 40 years, Son of Sri Rais Pal Singh, Resident of House No. 114, Lohia Bihar, Sector 9, P.S. Indira Nagar, District - Lucknow presently working as General Works Manager, United Breweries Limited, Plot No. A 1, Industrial Area, Kopakala, P.S. - Naubatpur, District - Patna

... .. Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Registration, Excise and Prohibition, Government of Bihar, Patna, Bihar
2. The Excise Commissioner, Bihar, Patna. Bihar
3. The District Magistrate-cum-Collector, Madhubani. Bihar
4. The Superintendent of Police, Madhubani. Bihar
5. The Station House Officer, Town Police Station, Madhubani. Bihar

... .. Respondent/s

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with

Criminal Writ Jurisdiction Case No. 157 of 2021  
Arising Out of PS. Case No.-265 Year-2020 Thana- MADHUBANI TOWN District-  
Madhubani

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MUKESH KUMAR Son of Sri Dhruv Narayan Mahto Resident of Shivaji Nagar, Pandaul Bazar, P.S.- Pandaul, District- Madhubani- 847234.

... .. Petitioner/s

Versus

1. The State of Bihar through the Director General of Police, Bihar, Patna. Bihar, Patna.
2. The Superintendent of Police, District- Madhubani. Madhubani.
3. The Station-House-Officer, Pandaul P.S., District- Madhubani. Madhubani.

... .. Respondent/s

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Appearance :

(In Criminal Writ Jurisdiction Case No. 89 of 2021)

For the Petitioner/s : Mr. Satyabir Bharti, Advocate  
Mr. Avinash Shekhar, Advocate

For the Respondent/s : Mr. P.K. Verma, AAG

(In Criminal Writ Jurisdiction Case No. 157 of 2021)

Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022

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For the Petitioner/s : Mr. Satyabir Bharti, Advocate  
Mr. Avinash Shekhar, Advocate

For the Respondent/s : Mr. P.K. Verma, AAG

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

ORAL JUDGMENT

Date : 09-02-2022

Heard Mr. Satyabir Bharti, learned Advocate for

the petitioner and Mr. P.K. Verma, learned AAG for the

State.

The two writ petitions have been filed for quashing the entire prosecution emanating out of Madhubani Town P.S. Case No. 265 of 2020 instituted for the offences under Sections 30(a) and 35(e) of the Bihar Prohibition and Excise Act, 2016 and under Sections 272, 273, 465 and 420 of the Indian Penal Code and restraining the respondents from taking any coercive step against the petitioner/company in pursuance of the aforementioned case.

On the basis of self-statement of one Dharam Pal, SHO of Madhubani Town Police Station recorded on 14.10.2020

, the subject FIR was registered. He has alleged that on 12.10.2020 at about 04:00 P.M., a police officer by the name of Niranjana Kumar Singh brought 24 bottles, each measuring 300 mls. of Ultra non-alcoholic beverage of Kingfisher company which was seized by the police team Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 from one Jiwach Kumar for which a Madhubani Town Station Diary No. 452 of 2020 dated 12.10.2020 was recorded.

On the basis of the aforesaid station diary entry, senior police officers were informed and the informant was told to have the liquid contained in those bottles examined by the Excise Department.

Pursuant to the aforesaid direction, the sealed bottles were sent to the Superintendent of the Excise Department, Madhubani for testing but the same was returned as there was no provision for testing in the Excise Office at Madhubani and a request was made to have the samples tested by the Chemical Examiner of Excise Department of Patna. As requested, the sample was sent to the Chemical Inspector of the Excise Department on 13.10.2020. The test report was to be sent to the office of the Sr. Superintendent of Police, Madhubani. The analysis report was received on 13.10.2020 which indicated that on examination, it was found that the sample liquid was a fermented liquor having ethyl alcohol content of 0.8% v/v which is in breach of the provisions contained under the Bihar Excise and Prohibition Act, 2016.

Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 The person who was found to be in possession of the aforesaid bottles viz. Jiwach Kumar was interrogated who disclosed that those bottles belonged to one Shankar Santhalia of Madhubani. Jiwach Kumar used to work as a salesman with aforesaid Shankar Santhalia. On the asking of his employer, he had brought those bottles but was apprehended by the police. It was further disclosed that Shankar Santhalia purchased those bottles from M/s. Ma Enterprises, Madhubani whose proprietor is Mukesh Kumar (petitioner in Cr.WJC No. 157 of 2021).

Aforesaid Jiwach Kumar was then taken into custody and later Shankar Santhalia was also arrested.

It was, therefore, alleged that the accused persons as well as the manufacturing unit of United Breweries Limited at Naubatpur, Patna and its Management and Work- force had committed a cognizable offence under various Sections of the Indian Penal Code and of the Bihar Prohibition and Excise Act, 2016.

On the basis of the aforesaid self-statement, Madhubani Town P.S. Case No. 265 of 2020 dated 14.10.2020 was registered for the offences under Sections Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 30(a) and 35(e) of the Bihar Prohibition and Excise Act, 2016 and under Sections 272, 273, 465 and 420 of the Indian Penal Code.

The petitioner (in Cr. WJC No. 89 of 2021) is a Company incorporated under the provisions of the Companies Act which is engaged in the manufacture of non- alcoholic beers/drinks at Naubatpur in the district of Patna.

In the present case, the manufacturing unit is being represented by the General Works Manager, Brewery viz. Amrish Kumar Singh.

The petitioner in Cr. WJC No. 157 of 2021 is the proprietor of M/s. Ma Enterprises, Madhubani. He is said to have purchased the non-alcoholic drinks through GST invoice for its sale in the district of Madhubani. He has the license under the Food Safety Act for sale of such beverages.

The prosecution against the petitioner/company has been challenged on the ground that none of the offences under the Indian Penal Code or under the Bihar Prohibition and Excise Act, 2016 was made out and that the Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 petitioner/company has never manufactured or sold any intoxicant or liquor as defined under the Excise Act.

It was also urged on behalf of the petitioner/company that assuming that a small percentage of ethyl alcohol was found in a non-alcoholic drink without there being any accusation or evidence of the drink being consumed or sold for the purposes of intoxication, no such prosecution could have been launched.

The petitioner/company in Cr. WJC No. 89 of 2021 is in the business of manufacturing alcoholic beverages/beer which is done strictly in accordance with Bureau of Indian Standards (BIS) and only after grant of a license issued by Food Safety and Standards Authority of India (FSSAI) for manufacture and sale of such non-alcoholic beverage.

It has been urged that after the imposition of prohibition in the State of Bihar on sale and consumption of foreign liquor and beer from 5th of April, 2016, the petitioner/company was required to seek permission from the Excise and Prohibition Department, Government of Bihar for manufacturing malt-based non-alcoholic drinks and on Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 such request to the Excise Department, the license was given on 13.12.2016 by the Excise Commissioner, Bihar.

Again by notification dated 24.01.2017, the petitioner/company was permitted to engage in the manufacture of non-alcoholic beverages.

The petitioner/company has been brewing malt- based non-alcoholic beverage which is being sold under the brand names of Kingfisher Radler and Kingfisher Ultra. The aforesaid drinks are absolutely non-alcoholic as the Bureau of Indian Standards has laid down the specifications for manufacture of carbonated beverages and it has been declared that a non-alcoholic beverage should contain less than 0.5% ethyl alcohol by volume.

It has also been urged on behalf of the petitioner/company that the license to brew such beverage was obtained from FSSAI also. The manufactured product of the petitioner/company was tested at the Government laboratory viz. CSIR-Central Food Technological Research Institute, Mysore (Food Safety & Analytical Quality Control Laboratory), which also reported that the drink was zero Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 percent alcohol based. The label on such drink also clearly specifies that it is a non-alcoholic drink.

Despite this, the petitioner/brewery does not know how the Chemical Examiner of the Excise Department at Patna gave a report that the sample so analyzed was found to be fermented liquor having ethyl alcohol content of 0.8% v/v.

Mr. Satyabir Bharti, learned Advocate for the petitioner/company has submitted that the Excise Act defines intoxicant and liquor respectively under Sections 2(40) and 2(44) respectively.

"Alcoholic Beverage or Portable liquor" and "BIS Standards" have also been defined under Sections 2(4) and 2(6) of the Bihar Prohibition and Excise Act, 2016.

The combined reading of these provisions, it has been urged, clearly reveals that an intoxicant is a liquor which is served as an alcohol or as a substitute for alcohol and is consumed for the purposes of intoxication. As per the BIS standard, a non-alcoholic drink ought to contain less than 0.5% v/v alcohol.

Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 In this background, it has been urged that only on the basis of a report of solitary Chemical Examiner of the Excise Department charging that the sample contained 0.8% v/v alcohol, it was not appropriate for the authorities to have launched the prosecution against the petitioner/company.

It has thus been alleged that assuming but not admitting that the sample contained more than 0.5% v/v alcohol but since the drink was not consumed for the purposes of intoxication, which is one of the necessary concomitants for bringing such beverage under the prohibition contained in the Act, no offence can at all be said to have been made out. There could be a myriad reasons for the reporting of more percentage of alcohol in the sample.

Without taking into account the possibility of further fermentation of the sample or of the bottle over the shelf which could have naturally raised the alcohol content, such a mindless prosecution has been launched.

It was brought to the notice of this Court that an identical issue was raised in the case of M/s. Smart India Marketing Vs State of Bihar was decided in Cr. WJC No. 627 of 2017, in which a Bench of this Court vide judgment Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 dated 05.11.2017 quashed the subject FIR, holding that the Prohibition Act does not prohibit sale etc. of non-alcoholic substances which is in conformity with the standard set by the BIS as defined under the Act.

The judgment referred to above inter alia holds that for attracting the penal provisions of Section 30(a), 30(g) of the Bihar Prohibition and Excise Act, 2016, the substance must be an intoxicant or a liquor which could be served as an alcohol or as a substitute of alcohol which is capable of being used or consumed for getting intoxicated.

The petitioner/company contends that the laboratory report of the Excise Chemist which is the very basis for initiating this prosecution is incorrect and such report ought not to have been taken as sacrosanct.

For testing the ethyl alcohol content in a beverage, FSSAI has prescribed a standard set of guidelines for detecting the ethyl alcohol content. Those guidelines have been

completely ignored while testing the sample and therefore the report by him is only a hasty conclusion.

As has been noted above, the sample of the products brewed in the brewery of the petitioner/company Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 was tested for ethyl alcohol at Mysore which certified that it had zero percent alcohol.

The petitioner/company further contends that in order to be doubly sure that the product brewed by the petitioner/company does not contain alcohol, the sample of the same batch was got tested by two National Accreditation Board approved testing and calibration laboratories viz. Intertek India Private Limited and Vimta which also reported zero percent alcohol in such sample.

The learned counsel for the petitioner/company has further submitted that there is yet another laboratory report of the same product by the same Chemical Examiner of the Excise Department, who has found the alcohol content in such sample to the extent of 0.4% v/v.

On coming to know of the prosecution in that regard, the petitioner/company immediately represented before the Excise Commissioner and requested him to get the samples tested by another NABL accredited laboratory having the facility for testing alcohol beverages in accordance with the guidelines provided by the FSSAI but no heed was paid to such request.

Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 On these grounds it has been urged that the entire prosecution against the petitioner/company emanating out of the subject FIR be quashed.

The Bureau of Indian Standards has come out with a second revision of the methods of test for alcoholic drinks.

There are three methods of testing for the purposes of determination of ethyl alcohol content has been provided in such standard.

The first method is a routine method for testing the apparent strength. The second method is known as referee method which tests the real strength and the third method is used only in cases of those alcoholic drinks which yield volatile oil on distillation.

The methods prescribed by the BIS specifies the apparatus which is to be used and the procedure for testing and also for calculation of the content.

There is nothing on record to indicate that such process was followed by the Chemical Examiner of the Excise Department of Government of Bihar at Patna and therefore

such report ought not to be treated as a final report for launching prosecution against anyone. Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 In State of Haryana & Others Vs. Bhajan Lal and Others reported in Supp(1) SCC 335, a two Judges Bench of the Supreme Court provided an illustrative set of situations, where the High Court could exercise its jurisdiction under Article 226 of the Constitution of India or Section 482 of the Code of Criminal Procedure for quashing the FIR.

One of the conditions provided is that if the allegations made in the FIR, if taken on its face value and accepted in its entirety does not prima facie constitute any offence or make out any case against the accused, such subject FIR can be quashed.

In a more recent decision of the Supreme Court in Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Others (2021) SCC OnLine SC 315, the Supreme Court has reiterated those principles but has cautioned that the investigation ought not to be thwarted and the power of quashing the FIR should be exercised sparingly with circumspection.

The prosecution of the petitioner in the instant case is on a finding that some of the samples which were seized contained more ethyl alcohol than the tolerance limit. If the Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 articles, so seized, were not sold as intoxicants or could be consumed as intoxicants, it would not fall under the category of liquor which is prohibited under the Act. A margin of error is inherent in such strict legislation.

The facts of this case thus does not warrant the prosecution of the petitioner.

There does not appear to be any intention on the part of the petitioner to breach the Excise Law.

There is no prohibition on the sale of non-alcoholic beverage.

The object and purpose of the prohibition law is to enforce, implement and promote complete prohibition of liquor and intoxicants in the State of Bihar and matters connected therewith and incidental thereto.

A minor infraction in the ethyl alcohol content of a non-alcoholic beverage like fruit beer does not at all offend the object and purpose of the Prohibition Act. It is highly unreasonable to conclude that a minor infraction would lead to prosecution of the person compulsorily.

Patna High Court CR. WJC No.89 of 2021 dt.09-02-2022 For the reasons aforesaid, the subject FIR viz. Madhubani Town P.S. Case No. 265 of 2020 is, hereby, quashed.

All other prosecution against the petitioners emanating out of the subject FIR is also quashed.

The applications stand allowed.

(Ashutosh Kumar, J) krishna/-

AFR/NAFR	NA
CAV DATE	NA
Uploading Date	26.02.2022
Transmission Date	26.02.2022