(2010) 10 CAL CK 0040

In the Calcutta High Court

Case No : Writ Petition No. 1158 (W) of 2008

Alpana Saha APPELLANT

Vs

The State of West Bengal and Others RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Bengal Excise Act, 1909 — Section 22(2), 37A, 8
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2
Constitution of India, 1950 — Article 226
West Bengal Excise (Foreign Liquor) Rules, 1998 — Rule 11, 12, 14(6), 234

Citation : (2010) 10 CAL CK 0040

Hon'ble Judges : Syamal Kanti Chakrabarti, J

Bench : Single Bench

Advocate : Asit Bhattacharya, for the Appellant;Krishnendu Sarkar, for Respondent No. 7, Tapas Banerjee and K.S. Mukherjee for State, for the Respondent

Judgement

Syamal Kanti Chakrabarti, J.—The present writ petition is directed against the order dated 07.01.2008 passed by the Secretary to the Government of West Bengal, Department of Excise whereby and whereunder he directed to include the name of Smt. Krishna Saha, alias Sailabala Saha, the respondent No. 7 as joint licensee in respect of a foreign liquor Offshop at Barabazar, Burdwan along with present petitioner herein Smt. Alpana Saha by setting aside the order dated 08.02.2006 passed by the Commissioner of Excise. The said order was passed by him in compliance with the order dated 09.02.2007 and 20.03.2007 passed by the Hon''ble Justice Dipankar Datta in W. P. No. 1733 (W) of 2007.

2. The present petitioner submits that one Probhat Kumar Saha had a license for a foreign liquor Off shop situated at Barabazar, Burdwan. The said Probhat Kumar Saha died on 13.11.1987 and was succeeded by his widow Smt. Sailabala Saha (wife), Prosanta Kumar Saha (eldest son), Goutam Kumar Saha (son), Utpal Kumar Saha (son) and Uttam Kumar Saha (son), Smt. Sabita Saha (married daughter) and Smt. Sampa Ghosh (married daughter). At that time Prosanta

Kumar Saha was the registered salesman of the said shop. On 16.01.1987 the said Prosanta Kumar Saha applied for settlement of the license in his favour along with a no-objection certificate from every legal heir of the deceased Probhat Kumar Saha. Accordingly a temporary license was granted in his favour in between 21.11.1987 and 10.05.1989 which was renewed from time to time and ultimately a permanent license was allowed in his favour on 11.05.1989 which was renewed from time to time in his favour between 01.05.1989 and 28.02.2001.

3. On 28.02.2001 other legal heirs of the deceased Probhat Kumar Saha wrote a letter to the Collector, Burdwan intimating that the said Prosanta Kumar Saha was separated from their family and as such they claimed renewal of the aforesaid license in respect of the liquor shop jointly in favour of all the legal heirs of the deceased Probhat Kumar Saha. The Collector, Burdwan disposed of the prayer by his order dated 27.12.2001 holding inter alia, that there was no scope for renewing the license jointly in favour of the petitioners but directed Prosanta Kumar Saha to deposit a sum of Rs. 5,00,000/- so that from the income thereof his mother, the respondent No. 7 could maintain here livelihood. Being dissatisfied with such order the respondent No. 7 preferred an appeal against such order dated 27.12.2001 before the Excise Commissioner, Burdwan. But the Excise Commissioner sustained the order of the Collector with the clear finding that the respondent No. 7, Smt. Krishna Saha was not fit to hold the license as she was over 65 years of age and had no experience to run a liquor shop. Another ground for passing such order was that if the license is renewed including the name of the respondent No. 7 she will be entitled to a share of profit in the business without investing any farthing to the capital of the said liquor shop and efficient running of the shop.

4. Challenging the said order of the Excise Commissioner, the respondent No. 7 filed a writ petition being W. P. No. 17261(W) of 2003. During pendency of such writ petition, the said Prosanta Kumar Saha died on 14.08.2005 and was succeeded by his wife Smt. Alpana Saha, the present writ petitioner, his son Sri Partha Sarathi Saha and his mother Smt. Krishna Saha as his only Class-I heirs.

5. In the meantime Smt. Alpana Saha, wife of deceased Prosanta Kumar Saha made an application to the Collector for granting temporary license on 16.08.2005 followed by another application praying for permanent license in her favour along with her son Sri Partha Sarathi Saha, a registered salesman of the shop. The respondent No. 7 Smt. Krishna Saha also applied for inclusion of her name in the license along with Smt. Alpana Saha. However, initially a temporary license was issued in favour of Smt. Alpana Saha on or about 18.08.2005.

6. In view of such claim and counter claim the Collector issued notice to both the parties and ultimately decided to grant permanent license in favour of Smt. Alpana Saha by his order dated 10.11.2005.

7. Suppressing this fact the respondent appellant filed a suit in the Court of the

Learned Civil Judge (Senior Division), Burdwan being T. S. No. 169/2550 of 2005 with an application under Order 39 Rule 1 and 2 of CPC seeking injunction order upon the respondent authorities from granting license in favour of Smt. Alpana Saha and Partha Sarathi Saha relating to the disputed business which is a joint family business in which in interim ex parte order was granted on 28.11.2005. But before such order dated 28.11.2005 the license was granted on 31.08.2005 in favour of Smt. Alpana Saha and ultimately the said Court refused to extend the interim order by order dated 16.01.2006.

8. Then the respondent No. 3 preferred an appeal before the Excise Commissioner which has been disposed of by order dated 08.02.2006. The private respondent No. 7 preferred a Second Appeal from the said order dated 08.02.2006 before the Principal Secretary, Department of Excise, Government of West Bengal on 18.05.2006.

9. Subsequently, the respondent No. 3 filed an application under Article 226 of the Constitution of India being W. P. No. 1733(W) of 2007 for early disposal of the appeal so preferred before the Principal Secretary, Department of Excise, Government of West Bengal without impleading the petitioner herein as a necessary party. This Hon''ble Court directed the Principal Secretary, Department of Excise, Government of West Bengal for early disposal of the appeal. It is further alleged that on 14.01.2008 the petitioner came to know that the respondent No. 3 had allowed the appeal filed by the respondent No. 7 by his order dated 07.01.2008 and has directed inclusion of the respondent No. 7 herein as a joint licensee along with the petitioner herein after setting aside the order dated 08.02.2006 passed by the Excise Commissioner which is now under challenge.

10. The respondent No. 7 in her affidavit-in-opposition has claimed that the disputed foreign liquor "Offshop" is a very old one from 1917 which was granted to Kalipada Shaw under the name and style of Kalipada Shaw and Sons which was started as a family business. After the death of Kalipada Shaw in 1955 the said license was issued in favour of his son Late Probhat Kumar Saha who happens to be the husband of respondent No. 7 and continued the family business as such. After the death of Probhat Kumar Saha on 13.11.1987 Prosanta Kumar Saha, her eldest son made an application before the authority in his name with a specific undertaking to run the said business without altering its nature of family business and to allow him to run the business on behalf of his family. At that time of death of the licensee there were two registered salesmen of the shop namely, Prosanta Kumar Saha and Uttam Kumar Saha, the eldest son and the youngest son respectively of deceased Probhat Kumar Saha. In such application for settlement of the license it was categorically stated that the same may be settled in favour of Prosanta Kumar Saha, one of the salesmen, on compassionate ground "for managing the family and my widow mother". On the basis of such assurance no objection was given in favour of her eldest son who was treated a guardian of the family.

11. Gradually her eldest son declined to retain the status of their joint family business and failed to provide barest securities of life to the old mother and his other brothers and refused to show any account of the joint family business and failed to maintain all the family members. Therefore, the respondent No. 7 along with her other sons filed an application before the Excise authorities under Rule 234 of the West Bengal Excise (Foreign Liquor) Rules, 1998 for transfer and/or sublease of the license in their name as well as filed the civil suit being Title Suit No. 255 of 2003 before the Learned Civil Judge (Senior Division) Burdwan. Her eldest son died on 14.08.2005 and so she made an application before the District Magistrate and Collector, Burdwan praying for settlement of the Excise license in respect of their said joint family business in the name of Smt. Alpana Saha, wife of her deceased son as well as in her own name as per provision of Rule 14(6) of their notification being 800Ex. Dated 29.07.2003. But the District Magistrate and Collector, Burdwan by his order dated 10.07.2005 rejected the prayer against which she preferred an appeal before the Commissioner of Excise which was also rejected on 08.02.2006. Therefore, she preferred an appeal before the Principal Secretary, Department of Excise, Government of West Bengal to allow the prayer on 07.01.2007 and directed to include her name as joint licensee along with Smt. Alpana Saha. In doing so he has not committed any wrong or violated any principles of natural justice for which such order should be interfered with.

12. Under the circumstances the points for my consideration are:

i) Whether the petition is maintainable in its present form ?

ii) Whether the writ petitioner is entitled to continue the business in her name to the exclusion of other family members of Late Probhat Kumar Saha;

iii) Whether the Principal Secretary to the Government of West Bengal, Excise Department is justified in passing his order dated 07.01.2007 directing the district authorities to include the name of the respondent No. 7, i.e., the widow of the said Late Probhat Kumar Saha as co-owner of their joint family business along with the present writ petitioner; AND

iv) Whether the appellate authority has observed all procedural formalities of giving opportunity to both the parties to make their submission before taking such decision on passed the order violating the principles of natural justice.

13. I have heard Learned Advocates for both the parties and perused the impugned order passed by the respondent.

14. Learned Lawyer for the respondent has assailed the same mainly on technical grounds for non availability of reasonable opportunity of being heard before passing the aforesaid order, Verification of affidavits by incompetent persons, filing of the writ petition on the Appellate Side and not on the Original Side etc. He has relied upon principles laid down in the following cases: -.

1) Ashok Lanka and Another Vs. Rishi Dixit and Others,

2) Union of India and another Vs. M/s. Jesus Sales Corporation,

3) A.K.K. Nambiar Vs. Union of India (UOI) and Another,

4) State of Haryana and Another Vs. Chanan Mal and Others,

5) R.S. Saini Vs. State of Punjab and Others,

6) Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc.,

7) B.C. Chaturvedi Vs. Union of India and others,

etc. in support of his contention, while petitioner has drawn my attention to the principles laid down in

1) Jain Exports (P) Ltd. and Another Vs. Union of India (UOI) and Others,

2) State Bank of Patiala and others Vs. S.K. Sharma,

3) B.C. Chaturvedi Vs. Union of India and others,

4) Union Bank of India Vs. Vishwa Mohan,

5) R.S. Saini Vs. State of Punjab and Others,

6) Sarabjit Kaur Vs. Union of India (UOI) and Others,

7) Umesh Challiyil Vs. K.P. Rajendran,

8) A.K.K. Nambiar Vs. Union of India (UOI) and Another,

in support of the contention.

15. So far as jurisdiction is concerned the Learned Lawyer for respondent has contended that the relevant record of the order of the Appellate Authority were lying at Writers'' Buildings where his office is also located. So the writ petition ought to have been filed on the Original Side of this Hon''ble Court and has drawn my attention to the principles laid down in Sarabjit Kaur Vs. Union of India (UOI) and Others, . Learned Lawyer for the petitioner has successfully assailed such argument and claimed that respondent Nos. 6 and 7 reside outside jurisdiction of the Original Side and so the petition is maintainable on the Appellate Side. In accepting this contention and relying upon the principles laid down in Sarabjit Kaur Vs. Union of India (UOI) and Others, as cited by him I hold that the writ petition is maintainable before Appellate Side of this Hon''ble Court.

Another argument has been advanced that the affidavit has not been properly affirmed by the petitioner. Learned Lawyer for the petitioner has also confronted such argument by taking the plea that for defective verification writ petition cannot be dismissed. In view of the ration in 2008 (11) SCC 740 notice to cure such defect should be issued. Since no such notice was admittedly issued, I hold that such argument is not sustainable and also rely upon the principles laid down in A.K.K. Nambiar Vs. Union of India (UOI) and Another, on the effect of want of verification. Moreover, I find from order dated 11.03.2008 passed by this Court that all these points were raised and decided therein including absence of demand notice and said order has reached its finality since not assailed before higher forum. So I hold that the petition is maintainable in its present form.

16. After careful consideration of the facts and circumstances of the case I find that in terms of Section 37A of the Bengal Excise Act 1909 Collector has discretionary power to select person as quoted below: -

Section 37A: "Selection of persons to whom licenses may be granted. Before granting a licence for the same by an intoxicant other than a licence referred to under Sub-section (2) of Section 22 the collector shall select, in such manner and subject to such restrictions as the State Government may prescribe, a person to whom such licence may be granted.

17. In granting the impugned licence the appellate authority has kept in mind the aforesaid statutory provisions in view of the given circumstances. Admitted possession in this case is that the disputed business belong to one Pravat Kumar Saha and his family members inherited the same and entrusted the eldest son of their joint family being karta of the family to run such business and to utilize the profit thereof of the benefit and welfare of their joint family. It will appear from the no objection given in favour of the eldest son Prasanta Kumar Saha and other members of the family made it clear that the same was entrusting for the benefit of their joint family. As a consequence the licence was admittedly settled up to 1998 in favour of the eldest son from the application dated 16.11.1987 made by Prasanta Kumar Saha (Annexure - R-1) to affidavit-in-opposition filed by respondent No. 7 it will appear that the joint family member was entrusted to him for contention of their business without any investment of capital by the eldest son. No audit report is forthcoming to shall the work capital and assets of the said liquor shop at the time of death of Pravat Kumar Saha. He who claim equity must come in clean hands here the capital investment of the business by deceased Pravat Kumar Saha obviously will be at the disposal of his legal heirs from which any one of the co-sharer should not ordinarily be deprived of. From the conduct of the respondent I find that the capital and the profit coming out from such investment shall never disclose to the other family members and as such the respondents are not entitled to any equitable relief.

18. This has earlier inspired the collector to reject the prayer of the present petitioner for inclusion of her name as co-owner of the aspect. Instead he directed the eldest son to set apart a sum of Rs. 5,00,000/-(Rupees five lakhs) as a capital from the income of which the livelihood of his aged mother could be provided. This is clear indication of the collector''s intention to take into account the interest of the other members of the joint family in granting temporary licence in favour of eldest son of deceased Pravat Kumar Saha.

19. From the impugned order of the Learned Appellate authority I find that the appellate authority has taken into consideration this aspect of the interest of other members of the joint family in the investment of capitals in the existing

business which was inherited from their ancestors and as such decided to include name of old mother along with her daughter-in-law for granting fresh licence.

20. The collector initially had refused to grant the licence in favour of the old mother on account of her incapacity and for want of her capital investment and because of her inexperience in this profession. The same argument will be applicable in case of granting licence in favour of daughter-in-law i.e. wife of deceased eldest son and as such both are on same footing being 1st Class legal heirs of deceased Prasanta Kumar Saha. Therefore, I do not find any illegality or impropriety in the impugned order passed by the Learned collector.

21. So far as technical aspect is concerned it is claimed that the respondents did not get adequate opportunity of hearing and instead of appellate authority somebody else was taking the step for which such findings should be set aside.

22. Learned Lawyer for the petitioner has contended that on 07.01.2008 parties were granted liberty to file written submission by 09.01.2008 but the impugned order was passed on 07.01.2008 wherein Principal Secretary has recorded that he has considered written submissions filed by the parties on 09.01.2008 which is contradictory.

23. From Annexure P-9 to the writ petition I find that on 28.11.2007 both the petitioner and respondent No. 7 were given notice to appear before the Principal Secretary, Excise Department at his chamber in Writers'' Buildings on 20.12.2007 at 3 P.M. It also appears from Annexure P-11 that written notes or submission on behalf of Sm. Alpana Saha were received by the office of the Principal Secretary on 09.01.2007. The date of order, however, was erroneously written as 07.01.2007 (Annexure P-14) and also mentioned as such in communication of such order as per Memo No. 50-EX/0/IN-31/07 dated 11.01.2008 made by Asstt. Secretary to the Government of West Bengal, Department of Excise addressed to the excise Commissioner, West Bengal. So the order must have been passed on or before 11.01.2008. In Para 11 of the A.O. filed by respondent it is averred that the order was actually passed on 10.01.2008. Non-consideration of written argument filed on 09.01.2008 (Annexure P-11) should, therefore be looked into on the touch stone of prejudice. Because in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., it has been set at rest that technical point cannot be sustained in judicial review unless prejudice is caused.

24. From the contents of such order I find that all the points agitated orally by both the parties in course of hearing have been dealt with by the Secretary in dealing with the appeal u/s 8 of the Bengal Excise Act, 1909. He has rightly decided that after publication of the Rules of 2003 on 30.07.2003 neither Rule 209 of Consolidated Rules nor Rule 234 of the Foreign Liquor Rules had any relevancy and force while the Collector and the Excise Commissioner passed their orders on 10.11.2005 and 08.02.2006 respectively after death of Prasanta Saha on 14.07.2005. I also find that the claim has rightly been decided under Rule 14(6) of the W.B. Excise (Selection of New Sites etc) Rules published under

Notification No. 800 Ex. dated 29.07.2003. In Rule 11 and 12 contained in such Notification there is no upper age limit and so the Secretary in his wisdom and after due application of his mind has taken the decision for granting licence in the name of both the 1st Class legal heirs of late Parasanta Saha who were on same footing in terms of eligibility criteria for selection of person for granting new licence.

25. Thus I find that such decision was taken after giving reasonable opportunity of being heard to the respondents and appellate authority has considered all points raised by them for which they are not at all prejudiced merely on account of error in recording the date of order. In deciding merit of a case the court should not emphasize on hyper technical issues and so relying upon the principles held in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., I hold that there is no merit in this writ petition which is accordingly dismissed.

26. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

Later

After delivery of the Judgment Learned Lawyer for the writ petitioner has prayed for operation of the above order which is opposed by Learned Lawyer for the respondent No. 7 considering all aspects such prayer is refused.