

(2020) 09 GAU CK 0014
In the Gauhati High Court
Case No : Writ Petition (C) No. 473 Of 2020

Amarendra Bhagawati

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 11-09-2020

Acts Referred:

Evidence Act, 1872 — Section 114
Assam Excise Act, 2000 — Section 29, 40, 42, 43, 52, 52(2)
Assam Excise Rules, 2016 — Rule 371
Constitution Of India, 1950 — Article 226

Citation : (2020) 09 GAU CK 0014

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : D. Gogoi, A.M. Dutta, K.K. Parashar, J.I. Borbhuiya

Final Decision : Allowed

Judgement

1) Heard Mr. J.I. Borbhuiya, learned counsel for the petitioner, Mr. D. Gogoi, learned standing counsel for the Excise Department of the State i.e. respondents no. 1 to 5 and 7 and also heard Mr. K.K. Parashar, learned Govt. Advocate for respondent no. 6.

2) By way of this writ petition filed under Article 226 of the Constitution of India, the petitioner has assailed the order dated 13.01.2020, passed by the Superintendent of Excise, Barpeta (respondent no. 4), directing the petitioner to close his IMFL "ON" shop until the situation comes to a normal position and also to find out another suitable location for shifting his IMFL "ON" shop for maintenance of peace and harmony. In this writ petition, it is projected that after completion of due procedure, upon obtaining NOC from all concerned, and on prior approval from the Office of the Commissioner of Excise, Assam (respondent no.2), the Deputy Commissioner, Barpeta (respondent no.3) vide order dated 01.10.2019, issued IMFL "ON" licence no. 16/2019-20 to the petitioner, thereby permitting consumption of Indian made foreign liquor in the premises of the

petitioner. It is projected that apprehending disruption of his business on the basis of manufactured complaint, the petitioner had approached this Court by filing W.P.(C) 263/2020 on 09.01.2020. However, in view of the impugned order dated 13.01.2020, the present writ petition has been filed.

3) In this case in hand, the Superintendent of Excise, Barpeta (respondent no.4) had exercised drastic power to close the shop of the petitioner without giving him any opportunity of being heard. The impugned order was passed without issuing any show cause notice and without any prior information to the petitioner about any complaint against his shop. Moreover, no opportunity was given to the petitioner of being heard during the enquiry conducted by the Circle Officer (respondent no.6). Hence, the Court would expect promptness of the part of the respondents to file their affidavit- in- opposition on receiving notice of this writ petition. The order to issue notice in this writ petition was passed 27.01.2020, and despite sufficient time of more than 7 (seven) months had been granted by orders dated 17.02.2020, 04.03.2020 and 19.03.2020, no affidavit- in- opposition has been filed by the respondents. Hence, the Court is inclined to invoke the doctrine of non- traverse and draw a presumption under section 114, Illustration (g) of the Evidence Act, 1872 to the effect that the reply, if any filed, would have gone against the respondents. Accordingly, the matter has been heard for final disposal.

4) The learned counsel for the petitioner has submitted that the impugned order dated 13.01.2020 revealed three points, firstly, that there was a public complaint before the Deputy Commissioner, Barpeta (respondent no.3), secondly, that the matter was enquired into by the Circle Officer, Sarthebari Revenue Circle (respondent no.6) and a detailed enquiry report was submitted to the Deputy Commissioner, Barpeta, and thirdly, that impugned order was issued after receipt of letter no. CAG.3/ 2019/Pt. dated 07.01.2020 from the Deputy Commissioner, Barpeta. It is submitted that the respondents have not been able to produce any document to show that the petitioner was ever informed to participate in the enquiry, as such, it is asserted that the purported enquiry by the Circle Officer (respondent no.6) was ex parte, by violating the principles of natural justice. It is submitted that the Superintendent of Excise, Barpeta (respondent no. 4) was not vested with power or authority to direct the petitioner to close his shop as the IMFL "ON" licence was granted by a superior authority on receipt of prior approval from the Government.

5) The learned standing counsel for the Excise Department of the State has submitted that he is yet to receive instructions. However, on a pointed query by the Court to show the relevant provisions in the Assam Excise Act, 2000 and Rules framed thereunder vesting power on the Superintendent of Excise to close IMFL "On" shop operating under a valid licence, the learned standing counsel made a reference to the provisions of section 52 of the Assam Excise Act, 2000.

6) In the present case in hand, it is seen that the categorical stand of the petitioner is that his IMFL "ON" licence was granted after following due process of

law. Hence, it is imperative that before granting such licence, the competent authorities of the State Excise Department must have satisfied itself about the compliance of the various formalities by the petitioner. The provisions of section 29 of the Assam Excise Act, 2000 requires that before licence is granted under the Act, the Collector shall take measure to ascertain local public opinion. However, the standing counsel for the Excise Department has not been able to refer to any provisions in the said Excise Act or Rules framed thereunder which empowers the competent authorities to suspend or cancel the licence of IMFL "ON" shop if a fresh "public opinion" is not in consonance with the previous "public opinion", which formed the basis of granting such licence.

7) Moreover, from the impugned order dated 13.01.2020, it is seen that no mention made therein that the petitioner has committed any breach of any of the terms and conditions of the licence or that he was found violating any statutory provisions and, as such, there is no material on record from which Court can draw inference or presumption that the power was exercised by the Superintendent of Excise (respondent no.4) under section 40 of the Assam Excise Act, 2000. The impugned order also does not disclose that the public complaint, if any, was brought to the notice of the petitioner or that he was given an opportunity of showing cause or an opportunity of being heard before issuance of the impugned order dated 13.01.2020, directing the petitioner to close his IMFL "ON" shop. When the provisions of the Assam Excise Act, 2000 and the Rules framed thereunder envisage cancellation or suspension of licence, there is no explanation by the authorities why the Superintendent of Excise (respondent no.4) had to request the petitioner to keep his IMFL "ON" shop closed. It would be appropriate to quote the contents of the said impugned order dated 13.01.2020 below:-

"With reference to the subject cited above, I am to inform you that several complaints from different organization/public have been received for shifting of your IMFL "ON" shop from the present location to other location for maintenance of public peace and tranquility, in this connection the matter has also been enquired into by the Circle Officer Sarthebari Revenue Circle. Accordingly, she has submitted a detailed enquiry report to the Deputy Commissioner, Barpeta.

You are therefore requested to remain close your IMFL "ON" shop until the situation comes to a normal position and also requested to find out another suitable location for shifting your IMFL "ON" shop for maintenance of peace and harmony.

The matter must be treated as most urgent."

8) By no means the contents of the impugned order dated 13.01.2020 can be construed as if the licence of the petitioner was either suspended or cancelled by an authority competent to do so. The respondents have not disclosed anything about the enquiry conducted by the Circle Officer (respondent no.6), or about the scope of such enquiry, or what was contained in the enquiry report. The

respondents have also not made any endeavour to explain before the Court that under which particular provisions of the Assam Excise Act, 2000 or Rules framed thereunder the enquiry was ordered and that which authority had ordered such an enquiry to be made.

9) As indicated herein before, the impugned order does not reflect communication of any notice to the petitioner to show cause before condemning him unheard. Hence, the Court finds that that the impugned order dated 13.01.2020 suffers from the vice of non-compliance of the principles of audi alterem partem rule. This reminds us of the observations made by the three Judge Bench of the Supreme Court of India in the case of *Ajit Kumar Nag. Vs. General manager (PJ), Indian Oil Corporation*, (2005) 7 SCC 764, which is quoted below:-

"44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten forbidden fruit. [See *R. v. University of Cambridge*, (1723) 1 Str 557: 93 ER 698]. But we are also aware that principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straight-jacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: " 'To do a great right' after all, it is permissible sometimes 'to do a little wrong' ". [Per Mukharji, C.J. in *Charan Lal Sahu v. Union of India*, (1990) 1 SCC 613 (para 124)(Bhopal Gas Disaster)]. While interpreting legal provisions, a court of law cannot be unmindful of hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'."

10) In the present case in hand, the impugned order dated 13.01.2020 is not found to have preceded by a show cause notice to the petitioner, as such, it is evident that no opportunity was given to the petitioner of being heard before ordering him to close his shop. The respondents could not show if the petitioner was served with a copy of purported complaint against his IMFL "ON" shop. Although the authorities had got the enquiry conducted by the Circle Officer (respondent no.6), but there is nothing on record that such enquiry was conducted after any notice to the petitioner to participate in the process. Therefore, there is no record of any satisfaction being recorded by the authorities to the effect that the petitioner was served with a notice and that he refused to participate in the enquiry. Moreover, it is also not on record as to whether or not

the report of such enquiry report was provided to the petitioner before issuing the impugned order. It is also not known if the investigation was done in accordance with section 42 and 43 of the Assam Excise Act, 2000. The impugned order does not show if the competent authority had either suspended or cancelled the IMFL "ON" licence of the petitioner. Thus, the inevitable conclusion that can be drawn by the Court is that the impugned order is vitiated on each and every count as indicated herein before.

11) The Court has also noted with concern that as per the provisions of section 52 of the Assam Excise Act, 2000, if a retail shop is ordered to be closed for the preservation of public peace, as per proviso to sub-section (2) of section 52, the duration of such closure cannot exceed 48 hours without the order of the Magistrate. However, the respondents have not brought on record any order of the Magistrate by which the IMFL "ON" licenced shop of the petitioner was ordered to be closed for a period of time exceeding 48 hours. The impugned order dated 13.01.2020 is found to be vitiated on this count also.

12) It is seen that column no. 5 of Rule 371 of the Assam Excise Rules, 2016 prescribes for the appointment and investing of powers. However, the standing counsel for the Excise Department could not show any clause therein by which the Superintendent of Excise had been vested with power to direct the petitioner to close the IMFL "ON" shop of the petitioner. Hence, the impugned order is found to be vitiated on this count also.

13) In view of the discussions above, the Court is inclined to hold that the impugned order bearing no. EXB-6/2019/5572-76 dated 13.01.2020 issued under the signature of the Superintendent of Excise, Barpeta is not sustainable on facts and in law and the said order is declared to be void ab initio. Accordingly, the Court has no hesitation to forthwith set aside and quash the said impugned order dated 13.01.2020. It is clarified that as the impugned order dated 13.01.2020 has been set aside, there is no necessity for any further direction to the respondents to allow the petitioner to continue his IMFL "ON" licenced shop in terms of his IMFL "ON" licence no. 16/2019-20.

14) With the directions as indicated herein above, this writ petition, accordingly, stands allowed.