
(2007) 10 PAT CK 0066
In the Patna High Court
Case No : LPA No. 402 of 2007

Bijay Bhagat @ Bijay Kumar Bhagat @ Bijay Kumar	APPELLANT
Vs	
The State of Bihar and Others	RESPONDENT

Date of Decision : 08-10-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2008) 1 PLJR 121

Hon'ble Judges : J.N. Bhatt, C.J.;Mihir Kr. Jha, J

Bench : Division Bench

Advocate : Harendra Tiwary, for the Appellant; K.K. Jha, for the Respondent

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.—The order, dated 2.3.2007 in a writ petition, CWJC No. 13522 of 2001, is the subject matter of this appeal, whereby and whereunder the learned Single Judge has dismissed the said writ petition seeking a relief of quashing the order of cancellation of a licence under the Bihar Trade Articles (Licences Unification) Order (hereinafter referred to as "the Order"). The facts giving rise to this appeal as can be culled out from the pleadings on record and the submissions made by the Counsel for the appellant-writ petitioner is that initially a licence under the Bihar Trade Articles (Licences Unification) Order, 1984 (hereinafter referred to as "the Order") was issued in favour of the appellant-writ petitioner. Subsequently noticing certain anomaly and violation of the terms and conditions of the licence, the Licensing Authority i.e. the Sub-Divisional Officer, Simri Bakhtiyarpur, Saharsa had issued a show cause notice seeking an explanation from the appellant-writ petitioner as to why his licence should not be cancelled.

2. In this regard, from the records of the connected writ petition, it is borne out that the appellant-writ petitioner was granted licence in the year 1985 for dealing in kerosene oil as a retail dealer and when certain complaints were received against him, he was asked to submit his show cause reply vide letter of the Sub-

Divisional Officer contained in memo No. 408-2, dated 25.4.2001. It has been further stated that the appellant-writ petitioner had submitted his show cause reply on 26.4.2001 and in the light of the cause shown by the appellant-writ petitioner, the matter was again enquired into by the Sub-Divisional Officer through the concerned Supply Inspector who submitted his comment on the explanation given by the appellant-writ petitioner and it was reported by him that the defence of the appellant-writ petitioner that on 17.4.2001, he had gone to lift the stock of kerosene oil from the premises of the wholesale dealer was totally incorrect inasmuch as the appellant-writ petitioner had never turned up for lifting the stock.

3. The counter affidavit also makes it clear that on receipt of the comment of the Supply Inspector, the Sub-Divisional Officer, the Licensing Authority had again given an opportunity to the appellant-writ petitioner to submit his further show cause reply vide his memo No. 414, dated 5.5.2001 for giving wrong and misleading information and making a false statement in his first show cause reply, dated 26.4.2001 and when the appellant-writ petitioner had submitted his further show cause reply on 12.5.2001 the same after being examined and having been found to be totally unsatisfactory led to the impugned order of cancellation of the licence of the appellant-writ petitioner as contained in letter, dated 25.7.2001.

4. It is apparent from the pleadings on record in the writ application itself that after the said order of cancellation of licence was passed by the Licensing Authority vide his memo No. 510-2, dated 25.7.2001 (Annexure-1 to the writ application), the appellant-writ petitioner had also filed an application before the Collector, Saharsa district on 14.8.2001 wherein it was prayed that the order dated 25.7.2001 revoking his licence should be set aside and his licence should be restored.

5. It, however, appears that soon thereafter the appellant-writ petitioner had filed the connected writ application, CWJC No. 13522 of 2001 on 9.10.2001 without waiting for the result of his representation, dated 14.8.2001 praying therein to quash the impugned order, cancelling the licence of the appellant-writ petitioner, dated 25.7.2001 and the respondents authorities be directed to allow the appellant-writ petitioner to deal in kerosene oil as retail dealer at Simri Bakhtiyarpur as stated in paragraph 20 of the writ application. A counter affidavit was also filed on behalf of the respondents in the said writ application on 21.1.2002 wherein the Sub-Divisional Officer, Simri Bakhtiyarpur, respondent No. 3, had set out the whole case as against the appellant-writ petitioner in paragraph Nos. 6 & 16 which go to show that in receipt of a complaint of Vinay Kumar Jaiswal, the Licensing Authority, the Sub-Divisional Officer, Simri Bakhtiyarpur had issued notice to the appellant-writ petitioner and thereafter the appellant-writ petitioner was given full opportunity of being heard in the matter of cancellation of his licence and only thereafter the Licensing Authority had passed the impugned order cancelling the licence.

6. It is significant to note here that none of the statements made in the counter affidavit filed way back on 21.1.2002 was denied by the appellant-writ petitioner before the Writ Court and no rejoinder to the counter affidavit was filed by the petitioner denying any of the facts mentioned in the counter affidavit. The writ application was ultimately taken up for hearing on 2.3.2007 and the learned Single Judge after examining the scheme of the Order had dismissed the writ petition holding that there was a provision for appeal against the order cancelling the licence and as such the writ application without exhausting the statutory alternative remedy by way of appeal was not maintainable.

7. It is against this order of dismissal of the writ application that the present appeal has been filed. Counsel for the appellant had assailed the order of the learned Single Judge primarily on the ground that the filing of appeal was not mandatory and in a given case, the writ application could be decided on merit by this court even without invoking the jurisdiction of appeal. In this context, it was further submitted on behalf of the appellant-writ petitioner that the order of cancellation of licence of the appellant, dated 25.7.2001 was actuated by malice of the wholesale dealer who got a false complaint lodged against him and ultimately got the licence cancelled through the licensing authority. It was also submitted that the writ court had committed an error in dismissing the writ application by referring the provisions of clause 28 of the Order even when such a plea was not raised in the counter affidavit, A grievance was also made that after more than six years of the cancellation of licence, the appellant could not have been non-suited on the ground of alternative remedy more so when the appeal under clause 28 of the Order could have not been filed after a lapse of almost six years as the period fixed for filing appeal under clause 28 of the Order is only 30 days. It was finally submitted that the interest of substantive justice would have been better served if the writ application had been disposed of on merits in place of its being dismissed on the ground "of non-exhaustion of the alternative remedy by way of filing appeal against the impugned order.

8. On the other hand, learned Counsel for the State while defending the impugned order had submitted that this Court in exercise of power under Article 226 of the Constitution of India normally should not interfere if the statute itself provides an alternative remedy by way of appeal. In this context, he had referred to clause 28 of the Order which provides for an appeal against any order passed by the competent authority under the Order. Learned Counsel has also with the help of the counter affidavit filed in the writ application, impressed upon this Court that it was not in exceptional case where the writ court could have interfered by setting aside the impugned order of cancellation of licence inasmuch as neither the question of jurisdiction nor the issue of violation of principle of natural justice was involved. In this context, he had referred to the serious nature of allegation against the appellant on the basis of which his licence has been cancelled.

9. After hearing the parties and perusing the record, I am of the view that there

is no infirmity in the impugned order of the learned Single Judge inasmuch as there is a full mechanism provided in the Order. From the scheme of the Order, it would be apparent that while clause 4 provides for issue of licence, clause 5 thereof makes a provision of renewal of licence and under clause 8 of the Order, a power is vested to the licensing authority to refuse the licence. Clause 10 of the Order lays down that no holder of licence issued under the Order shall contravene any of the terms and conditions of the licence and Clause 11 of the Order, as quoted herein below provides for suspension and cancellation of licence:--

11. Suspension and cancellation of Licence.-- (1) If any licensee or his agent or servant or any other person acting on his behalf contravenes any of the terms and conditions of the licence, then without prejudice to any other action that may be taken against him under the Essential Commodities Act, 1955 (Central Act 10 of 1995) his licence may be cancelled or suspended with regard to one or more trade articles by an order in writing of the Licensing Authority and an entry will be made in his licence relating to such suspension or cancellation.

(2) No order of cancellation shall be made under this clause unless the licensee has been given a reasonable opportunity stating his case against the proposed cancellation but during the pendency or in contemplation of proceedings of cancellation of licence, the licence can be suspended for a period not exceeding 90 days without giving any opportunity to the licensee of stating his case. Such suspension shall be limited only to those trade articles regarding which contravention has been made by the licensee.

10. It has to be kept in mind that in Part-IV of the Order, the Collector has been designated as Licensing Authority in respect of wholesale trade of any article specified in Schedule-I and the Sub-Divisional Officer and Special Officer Incharge, Rationing have been assigned the duty of Licensing Authority in respect of the retail trade or any article specified in Schedule-I within limits of their jurisdiction. Any and every decision(s) of the Licensing Authority and/or an Officer has been made appealable under Clause 28 of the Order which reads as follows:--

28. Appeal.--(1) Any person aggrieved by an order made by any officer under this Order:--

(a) if the order is made by any officer lower in rank than the Collector appeal to the Collector; and

(b) if the order is made by the Collector, appeal to the Commissioner.

(2) No such appeal shall be entertained if not preferred within 30 days from the date of receipt of the order appealed against by the appellant.

(3) No order which adversely affects any person shall be passed under this clause unless such person has been given a reasonable opportunity of being heard.

(4) Pending disposal of the appeal, the appellate authority may direct that the order against which the appeal is made shall not take effect until the appeal is disposed of.

11. It may be noted that under Clause 29 of the Order, there is a provision for revision, which reads as follow:--

29. Revision.--The Commissioner, suo moto or on an application, may call for the record of any case decided by the Collector or the Licensing Authority under the provisions of this Order and if he is satisfied that the Collector or the Licensing Authority--

(a) has exercised a jurisdiction not vested in him or it; or

(b) has exercised the jurisdiction vested in him or it with material irregularity; or

(c) has improperly failed to exercise the jurisdiction vested in him or it;

he may pass such order as he thinks fit.

12. Thus, from a close scrutiny of the whole scheme of the Order, it is absolutely clear that a complete mechanism has been set out under the Statute (the Order) and, therefore, any person aggrieved by the order of cancellation of licence normally will have to take recourse to the statutory appeal under Clause 28 and the revision under Clause 29 of the Order. By now, it is well settled that where it is open to the aggrieved parties to move either before the Tribunal or before the Authority in an appeal and/or revision in the manner provided in the Statute, this Court normally will not entertain a writ petition under Article 226 of the Constitution of India. The machinery created under the Statute cannot be by-passed and the aggrieved party has to initially seek remedy under the mechanism of the Statute. In fact the Apex Court in the case of C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, had held that Income Tax Act provides a complete machinery for assessment of tax and imposition of any penalty and for obtaining relief in respect of any improper orders passed by the income tax authorities, and a person who is aggrieved by an order of the Appellate Assistant Commissioner imposing a penalty, cannot be permitted to abandon that machinery and to invoke the jurisdiction of the High Court, under Article 226 when he had adequate remedy open to him by way of appeal to the Tribunal. Yet, again, the Apex Court in the case of Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, had held that the High Court will normally not entertain writ application in respect of 226 of the Constitution of India where there is an absolute remedy provided in the Statute.

13. I am not unmindful of the position in law that the rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion. It is also well settled that if gross injustice is done and if it can be shown that for good reasons, the Court should interfere, then notwithstanding the alternative remedy, which may be available by way of appeal or revision, the Writ Court can in proper cases exercise its power to do the

substantial justice. Reference in this case can be made to the judgment of the Apex Court, in the case of T.K. Rangarajan Vs. Government of Tamil Nadu and Others, where the Apex Court has held that the High Court under Article 226 of the Constitution is empowered to exercise its extraordinary jurisdiction to meet unprecedented extraordinary situation of an exceptional nature and in such a case, the High Court cannot disentitle the petitioner on the ground of availability of alternative remedy under the Statute. The Apex Court, however, had lodged a caveat that what could be such an extraordinary situation of exceptional nature will always depend on the facts of the case.

14. Thus, In the light of the law laid down by the Apex Court and having regard to the factual matrix of the present case, I am of the view that there is no such unprecedented extraordinary situation of exceptional nature or that any gross injustice has been done which may enable the appellant to avail the remedy under writ jurisdiction under Article 226 of the Constitution notwithstanding the alternative remedy available to him by way of appeal and/or revision under the Order. This is a simple case of cancellation of licence under Clause 11 of the Order by a competent authority on a valid ground and such an order of cancellation of licence is well within the jurisdiction of the Licensing Authority. Such order had also been passed after giving sufficient opportunity of hearing to the appellant who had responded to the show cause notice and had filed his exhaustive show cause reply as is apparent from the bare reading of Annexure-6 to the writ application. Consequently, it cannot be said that the appellant, as against the order of cancellation of his licence, was not required to avail the statutory alternative remedy under Clause-28 of the Order. The conclusion, therefore, of the learned Single Judge in holding the writ application to be not-maintainable in view of Clause-28 of the Order is unexceptional and must be upheld.

15. I have also noticed that the appellant had in fact filed an application before the Collector of Saharsa district, against the order, dated 25.7.2001 and the same was filed well within 30 days i.e. on 14.8.2001 praying therein to set aside the order, dated 25.7.2001 and restore his licence. In view of the fact that the filing of this application, Annexure-7 has not been denied even by the respondents in their counter affidavit, it must be held that an application against the impugned order of cancellation of licence, dated 25.7.2001 has already been filed which was required to be disposed of in terms of Clause-28 of the Order. Moreover, even if the application as contained in Annexure-7 of the appellant, dated 14.8.2001 was not described as an appeal, yet the same could have been treated to be a revision in terms of Clause-29 of the Order. The appellant, therefore, had to await the disposal of his revision, dated 14.8.2001 and the writ application filed by him on 9.10.2001 was definitely premature when his appeal/revision was in fact pending for consideration before the Collector of Saharsa district. Consequently, I find no reason to interfere with the order of the learned Single Judge and accordingly this appeal is dismissed.

Dr. J.N. Bhatt, C.J.

I agree.