

(2015) 10 PAT CK 0073

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 9230 of 2015

Bijay Metal Works

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 14-10-2015

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22, 22D
Constitution of India, 1950 — Article 136, 226

Citation : (2016) 1 PLJR 797

Hon'ble Judges : I.A. Ansari, Actg. C.J. and Chakradhari Sharan Singh, J.

Bench : Division Bench

Advocate : Satyabir Bharti, Advocate, for the Appellant; Lalit Kishore, Senior Advocate and Principal Addl. Advocate General, for the Respondent

Final Decision : Allowed

Judgement

Chakradhari Sharan Singh, J.—In view of the nature of controversy which the present proceedings under Article 226 of the Constitution of India involves, we have considered it appropriate to refer to the foundational facts relevant for adjudication before mentioning the relief sought for by the petitioner.

2. At the outset, we record that the facts are not at all in dispute, which are, in brief, as under:

"(i) The petitioner is a proprietorship firm and is, inter alia, engaged in manufacture of country liquor in the State of Bihar. Section 22D of the Bihar Excise Act, 1915, enables the State Government to part with its privilege to manufacture and supply of country liquor in favour of any person or persons on such terms and conditions as may be considered fit. Sub-section (2) of Section 22D of the Bihar Excise Act, 1915, provides a grantee of such privilege to apply for a licence from the Board of Revenue and unless such licence is received by him from the Board of Revenue or Commissioner of Excise or the Collector, a grantee is barred from manufacturing and supplying of country liquor under the grant awarded to it.

(ii) Prior to 24.10.2013, country liquor was, under the policy of the State Government, manufactured and packed in sachets by the grantees for the purpose of its supply to the Bihar State Beverages Corporation. By a resolution, dated 24.10.2013, the State Government came out with a new policy of supply of country liquor, in PET bottles. As per the said policy, the manufacture and supply of country liquor, in PET bottles, was to begin from 1.4.2014.

(iii) It was in the above backdrop that in exercise of power conferred by Section 22 of the Bihar Excise Act, 1915, the State Government had published and circulated a Notice Inviting Tender (in short, "NIT") dated 31.1.2014, for grant of exclusive privilege for manufacturing and supplying of country liquor in PET (Polyethylene Terephthalate) bottles through Bihar State Beverages Corporation Limited (hereinafter referred to as "BSBCL") for the period from 1st April, 2014, to 31st March, 2019. In the said NIT, as per Condition No. 2(Ka)(iii), the tenderers were required to have experience of, at least, three years in manufacturing and supplying of country liquor/spice country liquor during the last ten years, i.e. from the year 2004-2005 to 2013-2014. Admittedly, the petitioner did not fulfill the said requirement and challenged the aforesaid Condition No. 2(ka)(iii) of the NIT floated, on 31.1.2014, by filing an application, under Article 226 of the Constitution of India, giving rise to CWJC No. 3469 of 2014. The said application came to be dismissed by a Division Bench of this Court by an order, dated 14.2.2014, on the ground that the said requirement was neither arbitrary nor mala fide.

(iv) The petitioner preferred a petition under Article 136 of the Constitution of India before the Supreme Court against the order of this Court, dated 14.2.2014, aforementioned, which gave rise to Special Leave Petition (Civil) No. 5255 of 2014. By way of interim order, dated 20th February, 2014, passed in the Special Leave Petition, the Apex Court allowed the petitioner to participate in the tender process in compliance of which it was allowed to tender its bid. The petitioner became successful in obtaining the grant of privilege for manufacturing and supplying of country liquor, in PET bottles, for the period between 1.4.2014 and 31.3.2019 in respect of Zone No. 15 (Purnea), vide letter of grant, dated 4.3.2014.

(v) For the purpose of manufacturing and supplying of country liquor in PET bottles, the Government, as per its policy, fixed base rate for 200 ml. and 400 ml. bottle separately. A tenderer was required, as per the NIT, to quote its rate keeping in mind the base rate so prescribed under the policy. A tenderer, quoting the lowest rate for manufacturing and supplying of country liquor, was made entitled to grant of the privilege. Minimum Guarantee Quota (MGQ) for supply of country liquor by the grantees of the exclusive privilege was also prescribed. Based on the difference between the base rate and the rate quoted by the grantee for supply of country liquor, the differential amount was required to be paid to the State Government in four equal instalments (three months each). The first instalment was payable within seven days of finalization of the tender and

subsequent instalments were payable by 15th June, 15th September, 15th December and 15th March. This difference arising out of the gap, between base rate and the rate quoted by the grantee, taking into account MGQ, is commonly known as differential amount and has been referred to, accordingly, in the present judgment.

(vi) After award of the tender, the petitioner, complying with the requirement of Clause 3(vi) of the NIT, deposited, on 14.3.2014, requisite differential amount between the base rate and the tender rate, to the tune of Rs. 3,62,21,142/-."

3. It has to be kept in mind that the petitioner was required to deposit the first instalment in terms of the NIT after the grant having been made in its favour, though actual manufacture and supply of country liquor in PET bottles had not started. Further, the petitioner also furnished the bank guarantee of Rs. One crore against security deposit in compliance of Clause 2(gha)(i) of the NIT.

4. From the pleadings on record, we find that the petitioner had initially raised a dispute that the grant would have become effective only from the date, when manufacture and supply of country liquor, in PET bottles, had begun and, therefore, it should not have been compelled to deposit the first instalment of the differential amount. As has been noted above, the financial bid was allotted to the petitioner for manufacture of country liquor on 4.3.2014 and though the actual manufacture had not started, the petitioner was made to deposit the first instalment of the differential amount as per the NIT.

5. What is also required to be kept in mind is that as per the policy decision of the State Government, as contained in its Resolution, dated 24.10.2013, the manufacture and supply of country liquor, in PET bottles, were to begin with effect from 1.4.2014. On the one hand, the grantees were being made to pay instalments due in the month of June, September, December and March of the financial years, in question, though they were obviously not in a position to start actual manufacturing of country liquor in PET bottles.

6. Resisting the demand raised for payment of instalment, several writ applications were filed by the persons, who were granted privilege for manufacturing and supplying of country liquor, in PET bottles, through the tender process, in question, including this petitioner, vide CWJC No. 12301 of 2014. The common plea taken by all the petitioners, in a batch of writ applications being CWJC No. 11120 of 2014 (M/s. Alloy Food Private Limited v. State of Bihar & Others and other analogous cases), was that although they had been granted the exclusive privilege of manufacture of country liquor as envisaged under Section 22D of the Bihar Excise Act, 1915, the same had not become effective and, therefore, they were not liable to pay the differential amount being demanded by the State Government in instalments. In the meanwhile, the Department of Excise and Prohibition, Government of Bihar came out with a Resolution, dated 29th May, 2014, introducing amendment in Clause 9(e) of its earlier Resolution, dated 24.10.2013, whereby the manufacture and supply of country liquor, in PET

bottles, was required to commence from 1.4.2014. The terms and conditions in the NIT were in consonance with the terms of the Resolution, dated 24.10.2013. By the said Resolution, dated 29.5.2014, it was disclosed that the decision, as regards the date of commencement of manufacture and supply of country liquor, in PET bottles, shall be taken later on.

7. A Division Bench of this Court, taking into account the facts and circumstances of the case as indicated above, allowed the writ applications filed by the grantees by order, dated 28.7.2014, the relevant portion whereof is being extracted hereinbelow:--

"In our opinion, therefore, until the Government determines the date of manufacture and supply of liquor under the prevalent policy, the grant of exclusive privilege made on 3rd March 2014 would not become effective. Unless the grant becomes effective, the grantees cannot be compelled to pay the differential amount for manufacture and supply of liquor which has not yet commenced.

In the circumstances, the State Government ought to modify the dates on which the instalments for payment of differential amount would become due. Obviously, the State Government has failed to re-schedule the payment of differential amount in line with the extension of the effective date of grant giving rise to the stalemate. Now the State Government insists that it is entitled to demand the said amount as per the schedule contained in the tender notice.

We are alive to the fact that the matter arises from a contract. The grantees-writ petitioners did accept the contract with all its terms and conditions. Nevertheless, we believe that the State Government cannot be allowed to act like a Shylock, not ready to give up its pound of flesh. The condition that required commencement of manufacture and supply of liquor with effect from 1st April 2014 is frustrated.

As to the Government revenue, we must observe that it is not that the Government revenue would suffer on account of re-scheduling the payment of the differential amount. It is not in dispute that the supply of liquor has not been affected adversely. It is evident that the State Government has ensured regular supply of liquor by grant of temporary licence for supply of liquor in sachet under the tender notice dated 16th May 2014. It is also not in dispute that for the said privilege the concerned licensees are required to pay the differential amount between the base rate and the tender rate as per the terms and conditions. In other words, the State Government is already in receipt of its revenue from the temporary licensees for the period up to 30th September 2014. The State Government also demands the similar payments of differential amount from the writ petitioners, the grantees, for supply of liquor in PET bottles although they are, to the knowledge of the State Government, not able to commence manufacture and supply from 1st April 2014. In our opinion, the action of the State Government is indeed highhanded, arbitrary and unfair. Such action cannot

be sustained by the court of law.

For the aforesaid reasons, these Writ Petitions are allowed. The impugned decision of the State Government dated 19th June 2014 is quashed and set aside. The State Government is directed to re-schedule the payment of differential amount payable under clause 3(vi) of the tender notice dated 3rd February 2014 and to bring it in consonance with clause 9(e) as stands amended by the Government Resolution dated 29th May 2014, keeping with the date of manufacture and supply of liquor as may be decided by it. Until the payment is re-scheduled as directed, the State Government will not make coercive recovery of the instalment that has fallen due on 15th June 2014."

8. The Special Leave Petition, which the petitioner had preferred before the Supreme Court, came to be dismissed by an order, dated 14.8.2014, passed in S L P (Civil) No. 5272 of 2014.

9. As has already been noticed above, the petitioner had participated in the tender process, only on the basis of interim order passed by the Supreme Court in S.L.P. (Civil) No. 5272 of 2014, which finally came to be dismissed.

10. Consequent upon dismissal of the Special Leave Petition by the Supreme Court, the privilege, granted to the petitioner, for manufacturing and supplying of country liquor, in PET bottles, for Zone No. 15 (Purnea), was cancelled by the Excise Commissioner, Bihar, Patna, through letter issued under Memo No. 2707, dated 11.9.2014.

11. Admittedly, thus, before the State Government could re-fix the date of manufacture, exclusive privilege, granted in favour of the petitioner, came to be cancelled. After the said privilege in favour of the petitioner was cancelled in terms of the Resolution dated 30.5.2014, a decision was taken to prescribe another date for commencement of manufacture and supply of country liquor, in PET bottles, through a Notification, dated 12.12.2014, and 1.1.2015 (i.e., 1st of January, 2015) was prescribed as the date of such commencement.

12. It is in the background of the facts as noted above that the present application under Article 226 of the Constitution of India has been filed by the petitioner seeking issuance of a writ, in the nature of mandamus, commanding the respondents to refund a sum of Rs. 3,62,21,142.00, deposited by it as advance against the first instalment of the differential amount between the base rate and tender rate upon grant of exclusive privilege for manufacture and supply of country liquor for the Purnea Zone (Zone -15). It has also sought for a direction to release the bank guarantee of Rs. 1 Crore deposited by him against grant of said exclusive privilege. It has also claimed interest @ 18% per annum from the date, it became entitled for refund, i.e. the date of revocation of the privilege granted to him (12.9.2014), till its actual payment.

13. We have heard Mr. Satyabir Bharti, learned counsel for the petitioner, and Mr. Lalit Kishore, learned Principal Additional Advocate General, representing the

State of Bihar.

14. Mr. Bharti, learned counsel, appearing for the petitioner, has submitted that the liability of payment of differential amount accrued only after the date of manufacture and supply of country liquor, in PET bottles, to be notified in terms of the amended Resolution, dated 29.5.2014. According to Mr. Bharti, learned counsel, date of commencement of manufacture and supply of country liquor, in PET bottles, was fixed as 1.1.2015 through Notification, dated 12.12.2014. Mr. Bharti has, accordingly, submitted that the petitioner would have been liable to pay the differential amount from the date notified for commencement of manufacture and supply of country liquor in PET bottles, but as the privilege, granted in favour of the petitioner, was revoked before the date fixed for such commencement, the respondents ought not to have denied refund of the first instalment of the differential amount, deposited by the petitioner, on grant of privilege in its favour.

15. Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondents-State of Bihar, opposing the relief sought for by the petitioner, has contended that the petitioner took a calculated risk and voluntarily deposited the differential amount between the base rate and tender rate besides security deposit in the shape of bank guarantee. Mr. Kishore has contended that the amount, which the petitioner had deposited as the first instalment against award of tender, was as per the terms and conditions prescribed in the NIT and, therefore, the respondents-State are not required to refund the amount.

16. In reply, Mr. Bharti, learned counsel, has submitted that the petitioner had participated in the tender process in terms of interim order of the Supreme Court. After having become successful, it had deposited the first instalment of the differential amount upon grant of exclusive privilege in its favour. The reason, for which it had deposited the amount, itself disappeared with the revocation of privilege granted in its favour. Mr. Bharti has further submitted that the date, prescribed by Clause 9(e) of the policy of the State Government, finally came to be shifted to 1.1.2015 from 1.4.2014. He has also submitted, referring to statement made in supplementary affidavit filed on behalf of the petitioner, that while appreciating the practical difficulty in commencing the manufacture and supply of country liquor, in PET bottles, with effect from 1.4.2014 and in order to ensure that supply of country made liquor remains uninterrupted, tenders were finalized and grants were made to eligible contractors and the grantees for manufacture and supply of country liquor in sachets. The State Government, he would contend, received consideration in terms of the differential amount between base rate and tender rate as also the licence fee during the intervening period and there was thus no loss of revenue to the State Government. This contention has not been disputed.

17. In view of the uncontroverted facts as noted above and the submission advanced on behalf of the petitioner and the State respondents, the question is as to whether the petitioner can be denied refund of the amount of the first

instalment, which the petitioner had deposited upon grant of exclusive privilege in its favour for manufacture and supply of country liquor, in PET bottles, in compliance of the terms and conditions of the NIT, though the grant of privilege came to be revoked even before the date prescribed, under the amended policy of the State Government, for manufacturing and supplying of country liquor, in PET bottles instead of sachets, was reached. The question needs to be determined in the background of the admitted facts.

18. Even at the cost of repetition, we point out that the very purpose for depositing the first instalment of differential amount between the base rate and the tender rate, was manufacture and supply of country liquor in PET bottles. The tender was awarded in favour of the petitioner after it was allowed to participate in the tender process on the strength of an interim order passed by the Supreme Court. Upon dismissal of the Special Leave Petition before the Supreme Court, the privilege, granted in favour of the petitioner was revoked. The manufacturing process had yet not begun. The very policy of the State Government fixing 1.4.2014, as the date for commencement of manufacture and supply of country liquor in PET bottles, came to be shifted to 1.1.2015 by introducing amendment in Clause 9(e) of the policy of the State Government.

19. Evidently thus, before the policy of the State Government to commence manufacture and supply of country liquor, in PET bottles, became effective, the privilege granted to the petitioner under the said policy, was revoked. Would it be just, in such circumstances, for the State of Bihar, to refuse to refund of the first instalment of the differential amount, which the petitioner was made to deposit, immediately after grant of privilege in favour of the petitioner? Will it not amount to unjust enrichment for the State of Bihar if it is allowed to retain the consideration amount against the privilege granted to the petitioner, which privilege came to be revoked before it became effective?

20. "Unjust enrichment" has been defined in Black's Law Dictionary, 8th Edition (Bryan A. Garner), as a benefit from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or should recompense. It is unjust retention of a benefit to the loss of the another or retention of money or property of another against the fundamental principles of justice or equity or good conscience. The Supreme Court in its judgment reported in Indian Council for Enviro-Legal Action Vs. Union of India (UOI) and Others, , quoted, with approval, the following passage of King's Bench decision in Nelson v. Larholt [(1947) 2 All ER 751, which reads:--

"It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires."

21. The Supreme Court held, in *Indian Council for Enviro-Legal Action* (supra), that an unjust enrichment occurs, when the defendant wrongfully secures benefit or passively receives a benefit, which would be unconscionable to retain. Paragraphs 153 and 154 of the decision, in *Indian Council for Enviro-Legal Action* (supra), are relevant and are accordingly being extracted hereinbelow:--

"153. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received (it) honestly in the first instance".

"154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of *Fibrosa Spolka Akcyjna v. Fairbrain Lawson Combe Barbour Ltd.* (1943 AC 32: (1942) 2 All ER 122 (HL), Lord Wright stated the principle thus :

"... Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

22. Applying the doctrine of unjust enrichment to the present set of facts, we find that the petitioner was made to deposit the differential amount in terms of the NIT, which was floated for manufacture and supply of country liquor, in PET bottles, in furtherance of the State Government's policy decision as contained in its Resolution, dated 24.10.2013, which prescribed, inter alia, that manufacture and supply under the said policy would begin from 1.4.2014. The petitioner did deposit the amount upon grant of privilege and as has been pleaded in the writ application, the petitioner did make investment for manufacture and supply of country liquor in PET bottles. Considering practical aspect and a decision of this Court in case of *M/s. Alloy Food Private Limited* (supra), it is clear that the effective date of implementation of the said policy itself was extended to 1.1.2015. It is not in dispute that the petitioner did not start manufacturing of country liquor in PET bottles, let alone their supply in terms of the NIT. Before the policy of the State Government could become effective, the privilege, granted to the petitioner for manufacture and supply of country liquor in PET bottles, was taken away, as the petitioner has lost its lis before Supreme Court. Nothing has been brought on record to show to us that because of the petitioner's participation in the tender notice, on the strength of interim order of the Supreme Court, any loss of revenue was caused to the State of Bihar. It is also not in dispute that as the date for supply of country liquor, in PET bottles, was decided to be extended to 1.1.2015, the State of Bihar invited tender and granted privilege to the successful tenderers for supply country liquor in sachets

so that there was no loss of revenue to the State of Bihar, and at the same time, supply of country liquor for consumption remained uninterrupted. In such circumstances, in our opinion, it would be an unjust enrichment, on the part of the State of Bihar, if it is allowed to retain the amount, which the State might have received lawfully as first instalment of the differential amount.

23. Once we hold that retention of the amount, deposited by the petitioner to the tune of Rs. 3,62,21,142/- by the State of Bihar, will amount to unjust enrichment, it would be just and equitable for this Court to issue a direction to the respondents for restitution of the deprivation of the said amount. In the case of *Indian Council for Enviro-Legal Action (supra)*, dealing with the concept of unjust enrichment and restitution, the Supreme Court laid down the law, in paragraphs 161 to 163, as follows:--

"161. The terms "unjust enrichment" and "restitution" are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or noncompliance with court orders.

"162. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages i.e. pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the courts own process, along with time delay, to do injustice.

"163. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether."

24. In the case of *Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd.*, , the Supreme Court held that jurisdiction and general powers to make restitution is inherent in every court and will be exercised whenever the justice of the case demands.

25. In view of the discussions held as above, we are of the considered view that the said amount of Rs. 3,62,21,142/-, deposited by the petitioner as first instalment of the differential amount, needs to be refunded forthwith to the petitioner by the State of Bihar. We are also of the view that the bank guarantee of Rs. One crore, deposited by the petitioner against the said grant of exclusive privilege, needs also to be returned back to the petitioner. We accordingly direct the respondents, particularly, respondent No. 2, the Secretary-cum-Excise

Commissioner, Bihar, Patna, to refund the said amount and return the bank guarantee to the petitioner within a period one month from the date of receipt/production of a copy of this order.

26. The petitioner has also sought for a direction for award of interest on the said amount on a plea that the respondents wrongfully retained the said amount despite repeated requests made by the petitioner for refund of the amount. Considering the facts and circumstances of the case, we do not find it an appropriate case for award of interest on the said amount. It is, however, made clear that if the respondents fail to refund the said amount and the bank guarantee within the period stipulated in the present order, the petitioner shall be entitled for interest @15% per annum from the date of revocation of its privilege, i.e. 11.9.2014, till actual payment is made.

27. This writ application is accordingly allowed with the observations as above.