
(2015) 02 RAJ CK 0106
In the Rajasthan High Court
Case No : Civil Writ Petition No. 9112/14

Budh Ram

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 26(d)

Citation : (2015) 2 CDR 980

Hon'ble Judges : Sangeet Lodha, J.

Bench : Single Bench

Advocate : Rajesh Joshi, for the Appellant; Sachin Acharya, Advocates for the Respondent

Final Decision : Allowed

Judgement

Sangeet Lodha, J.—By way of this writ petition, the petitioner has questioned legality of order dated 1.12.14 passed by the Additional Commissioner, Excise, Udaipur Zone, Udaipur, cancelling the license issued in favour of the petitioner for Vend of Lanced Poppy Heads (LPH) (for Wholesale and Retail Shops of Group Bikaner-I and production area Vallabhnagar-I), forfeiting the stock of Poppy Heads purchased by the petitioner from the opium cultivators of the area Vallabhnagar-I and deposited in the Wholesale and Bonded Warehouse, forfeiting the security deposit, withholding the bank guarantee and directing filing of the challan against the petitioner after investigation in the criminal case registered against him vide F.I.R. No. 20/2014-15 dated 6.8.14.

2. The relevant facts in nutshell are that the petitioner was issued licenses of wholesale shop for vend of LPH for Group Bikaner-I and for production area Vallabhnagar-I by the Additional Commissioner, Excise Zone, Bikaner for the period 2014-15 i.e. from 1st April, 2014 to 31st March, 2015. Likewise, a license for Retail Shops of Group Bikaner-I, came to be issued in favour of the petitioner by the District Excise Officer, Bikaner. As per the terms and conditions of the

license for the production area Vallabh Nagar-I, it was incumbent upon the petitioner to collect the requisite LPH from 391 permit holders of Group Vallabh Nagar-I. The petitioner was required to deposit the collected LPH to bond (excise duty free warehouse) or to wholesale warehouse (where requisite excise duty was supposed to be paid). The LPH to be collected from the area in question was to be consumed in consumption area i.e. Bikaner-I either in wholesale or in retail.

3. On 17.7.14, the petitioner was served with a notice issued by the District Excise Officer, Udaipur, containing the allegation that the petitioner has failed to collect LPH from 239 cultivators despite being warned from time to time. The petitioner was informed that the requisite quantity of LPH may be collected from the cultivators within a period of one week, failing which for violation of the conditions of the license, appropriate legal proceedings shall be taken.

4. The notice issued as aforesaid was responded to by the petitioner vide reply dated 25.7.14, taking the stand that despite the efforts being made, the cultivators are not supplying the requisite quantity of LPH, saying that the crops have been eaten away by Blue Bulls and are not available with them. The petitioner also furnished the list of the cultivators who refused to supply LPH in the requisite quantity. The petitioner requested for the help of the Department of Excise for collection of the requisite quantity of LPH from the cultivators.

5. At this stage, on 6.8.14, the Excise Inspector, Circle Mavli, Udaipur, lodged an F.I.R. being No. 20/2014-15, against the petitioner alleging commission of offence under Section 26(d) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act"). The allegations contained in the F.I.R. read as under:

6. The condition No. 15 of the License alleged to have been breached by the petitioner, reads as under:

7. The petitioner vide an application dated 16.9.14 prayed for compounding of the offence in the following terms:

8. The application preferred by the petitioner for compounding of the offence under Section 26(d) of the Act, was processed by the respondents and vide notice dated 10.11.14, he was directed to appear for hearing before the Additional Excise Commissioner, Udaipur Zone, Udaipur, on 19.11.14. The contents of the notice may be reproduced hereunder:

9. In response to the notice, the petitioner appeared before the Additional Excise Commissioner on 19.11.14. Vide order dated 1.12.14, while rejecting the application preferred by the petitioner for compounding of the case registered vide F.I.R. No. 20/2014-15 for offence under Section 26(d) of the Act, the Additional Excise Commissioner held the petitioner guilty of the allegation that though the petitioner collected LPH from 391 cultivators, he failed to bring 131.81 quintals LPH collected from 201 cultivators to the approved bonded/wholesale warehouse and thus, indulged in illegal sale of 131.81 quintals LPH.

The Additional Excise Commissioner arrived at the finding that the petitioner has violated the conditions of the license and the irregularity and the criminal act committed by him being of grave nature, he has lost the legal right to collect and sale LPH on the strength of the license issued in his favour. Accordingly, while cancelling the license issued in favour of the petitioner with immediate effect, the stock of LPH purchased by the petitioner from the cultivators deposited with wholesale and bonded warehouses as also his security deposit, has been forfeited. The directions have also been issued to the District Excise Officer not to release the bank guarantee furnished by the petitioner without permission of Excise Commissioner Rajasthan, Udaipur. The cost of 131.81 quantal LPH, equal to the sale price, is ordered to be recovered from the petitioner. That apart, the directions have been issued to complete the investigation in the criminal case registered against the petitioner vide F.I.R. No. 20/2014-15 dated 6.8.14 and to file challan against him before the court of competent jurisdiction.

10. The order dated 1.12.14 passed by the Additional Excise Commissioner was served upon the petitioner on 3.12.14, however, on 2.12.14 a "Notice Inviting Tender" (NIT) was issued by the District Excise Officer, Bikaner inviting application for grant of fresh license for the remaining period of the year 2014-15. Hence, this petition.

11. On 8.12.14, while issuing notices, this court by way of an interim order, restrained the respondents from issuing the license to the highest/successful bidder pursuant to the impugned NIT dated 2.12.14. The interim order granted as aforesaid is operative till this date.

12. Learned counsel for the petitioner contended that the order impugned has been passed by the Additional Excise Commissioner in flagrant violation of principles of natural justice. Learned counsel submitted that while passing the order impugned, the petitioner has been held guilty of the allegations never levelled against him. Learned counsel submitted that the petitioner had preferred an application for compounding of the case registered against him vide F.I.R. No. 20/2014-15 for offence under Section 26(d) of the Act, at the behest of the respondents. Learned counsel submitted that the petitioner was not aware that the Additional Excise Commissioner is not competent to compound the offence under Section 26(d) of the Act and therefore, realising the mistake, the proceedings taken for compounding the offence should have been dropped by the Additional Excise Commissioner. Learned counsel submitted that the petitioner was never served with a notice proposing to revoke the license granted in his favour, as per mandate of the provisions of Rule 36 of Rajasthan Narcotic Drugs and Psychotropic Substances Rules, 1985 (for short "the Rules") and therefore, he had no occasion to defend the allegations, which are found to be proved by the Additional Excise Commissioner. Learned counsel submitted that while passing the order impugned in the proceedings initiated for compounding the offence under Section 26(d) of the Act, the petitioner has been held guilty of the allegation that he collected 131.81 quintals LPH from 201 cultivators, but did

not deposit the same in the approved bonded/wholesale warehouse. Learned counsel submitted that before initiating the proceedings for revocation/cancellation of the license, the respondent authority was under an obligation to serve the petitioner with a notice setting out the alleged breaches and defaults so that he gets an opportunity to rebut the same. Learned counsel submitted that the petitioner was not even aware that in the garb of the proceedings initiated for compounding of the offence by the Additional Excise Commissioner, acting without jurisdiction, the license issued in his favour would be cancelled. Learned counsel submitted that in the reply filed on 25.7.14, the petitioner had already clarified that even after efforts being made, the cultivators are not supplying the requisite quantity of LPH and therefore, adequate help is required at the department level to do the needful. Learned counsel submitted that in no manner, the application preferred by the petitioner could be construed to be an unqualified admission on his part, sufficient to hold him guilty of the allegations, without giving him an opportunity of hearing as per the mandate of Rule 36 of the Rules and the principles of natural justice. Learned counsel submitted that as a matter of fact, the allegation against the petitioner has been held to be proved on the basis of the statements of cultivators alleged to have been recorded during the investigation of the criminal case, without extending an opportunity of hearing to rebut the same, which is ex facie violative of elementary principles of natural justice and therefore, the order impugned deserves to be set aside. In support of the contention, learned counsel has relied upon a decision of the Hon'ble Supreme Court in the matter of Gorkha Security Services Vs. Govt. of NCT of Delhi,

13. On the other hand, Dr. Sachin Acharya, learned counsel appearing on behalf of the respondents submitted that the order impugned passed by the Additional Excise Commissioner, cancelling the license of the petitioner is appealable before the Commissioner Excise under Section 9A of the Rajasthan Excise Act, 1950 (for short "the Act of 1950"), and therefore there is absolutely no reason as to why the petitioner should be permitted to invoke the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India, by passing the effective and efficacious remedy of appeal available under the relevant statute. In support of the contention, learned counsel has relied upon a decision of the Hon'ble Supreme Court in the matter of Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, . Learned counsel submitted that though the petitioner was not served with the notice in terms of Rule 36 of the Rules but then, on account of non service of the notice, no prejudice has been caused to him inasmuch as, he had already been apprised of the allegations against him, vide notice dated 17.7.14. Learned counsel submitted that the petitioner being fully aware about the allegations levelled and having admitted the guilt by way of application dated 16.9.14, the finding arrived at by the authority concerned holding the petitioner guilty, cannot be faulted with. Learned counsel submitted that under the license issued, the petitioner was dealing with the contraband and therefore, the consequences of the petitioner's failure to collect the LPH from the

cultivators are obvious. Drawing the attention of the court to the application dated 16.9.14 containing the admission of guilt on the part of the petitioner, learned counsel submitted that the guilt having been admitted by the petitioner, no other conclusion in the matter was possible and therefore, on the facts and in the circumstances of the case and taking into consideration the public interest involved, merely because a notice in terms of Rule 36 of the Rules, has not been issued to the petitioner, no interference by this court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India is warranted. Learned counsel submitted that the contention of the petitioner is that he has been held guilty of the allegation never levelled against him, is absolutely incorrect. Drawing the attention of this court to the order impugned, learned counsel submitted that during the course of hearing, the petitioner was given an opportunity to go through the statements of the cultivators recorded by the Investigating Officer and therefore, it cannot be said that the petitioner has been held guilty of the allegation levelled in violation of the principles of natural justice. Relying upon the decision of the Hon''ble Supreme Court in the matter of *The Chairman, Board of Mining Examination and Chief Inspector of Mines and Another Vs. Ramjee*, , learned counsel submitted that unnatural expansion of principles of natural justice without reference to the administrative realities and other factors of the case would not be appropriate. Learned counsel urged that if on admitted or indisputable factual position, only the one conclusion is possible and permissible, the court should not issue a writ merely because there has been violation of the principles of natural justice. Learned counsel submitted that in view of the admission of the guilt by the petitioner, the requirement of the notice in terms of Rule 36 of the Rules, has rightly been waived by the competent authority, with an intention to protect the public interest. In this regard, learned counsel has relied upon a decision of the Hon''ble Supreme Court in the matter of *M.C. Mehta Vs. Union of India (UOI) and Others*, .

14. Mr. M.S. Singhvi, learned Senior Advocate appearing on behalf of the intervenor submitted that in conformity with the principles of natural justice, the notice dated 17.7.14 was issued by the District Excise Officer, Udaipur, to the petitioner and therefore, the petitioner was well aware about the allegations levelled against him. Learned counsel submitted that no notice proposing compounding of the offence was issued and therefore, the application preferred by the petitioner for compounding was obviously in response to the notice dated 17.7.14, issued by the District Excise Officer. Learned counsel submitted that the petitioner was required to collect the requisite quantity of LPH from the cultivators by 30.6.14 and as a matter of fact, the period fixed for collection could not have been extended by the respondents upto 31.7.14. Learned counsel submitted that if the LPH is not collected by the licensee within the stipulated period, the same is bound to be misused. Learned counsel submitted that the standard of the degree of proof with regard to contraband has to be different and therefore, after admission of the guilt on the part of the petitioner, it is not open for him to contend that no notice setting out the allegations was served upon

him. Learned counsel submitted that the requirement of the waiver of the notice in the instant case could be inferred by the court inasmuch as, after issuance of the notice dated 17.7.14, the petitioner by way of application dated 16.9.14 admitted the guilt. Learned counsel submitted that it is true that the allegation with regard to the requisite quantity of LPH collected by the petitioner from the cultivators being not deposited in the Wholesale/Bond Warehouse was not set out in the notice dated 17.7.14 issued to the petitioner but then, he was made aware about the evidence in this regard available on record. Learned counsel submitted that if the order passed by the authority concerned is separable and the finding of guilt with regard to not collecting the requisite quantity of LPH from the cultivators within the stipulated period stands proved, which entails cancellation of the license necessarily, there is no reason why the order impugned passed by the competent authority should be interfered with by this court. Learned counsel submitted that in exercise of the equitable jurisdiction under Article 226 of the Constitution of India, the court would not like to interfere with the order merely because, it is lawful to do so. Learned counsel submitted that on the facts and in the circumstances of the case, when there is no different view from the one taken by the authority concerned is possible, the petitioner is not entitled for the discretionary relief in exercise of extra ordinary jurisdiction of this court. In this regard, learned counsel has relied upon the decisions of the Hon"ble Supreme Court in the matter of "ONGC Ltd. vs. Sendhabhai Vaastram Patel and Ors.", (2005) 6 SCC 454 and Aligarh Muslim University and Others Vs. Mansoor Ali Khan, .

15. I have considered the rival submissions of the learned counsel for the parties and perused the material on record.

16. There cannot be any quarrel with the proposition that in exercise of the extra ordinary jurisdiction under Article 226 of the Constitution of India, this court would not interfere with the order passed by the competent authority merely because, it is lawful to do so and in all cases, where the principles of natural justice are violated, the court would not grant the relief, if it is found that on account of waiver of notice, no prejudice has been caused to the person against whom action is taken by the competent authority. It is also settled that on the admitted and undisputed fact if only one conclusion is possible and only one penalty is permissible, the court may not issue its writ for observance of principle of natural justice, because courts do not issue futile writs. [vide S.L. Kapoor Vs. Jagmohan and Others, . But then, it also stands firmly established that the rules of natural justice are assurances of justice and fair play and therefore, any action which has evil and civil consequences, should be taken only after following the principle of natural justice. Suffice it to say that observance of principles of natural justice is a rule and exclusion an exception and therefore, unless exceptional circumstances justifying exclusion thereof exist, departure therefrom is not permissible under the law.

17. In this backdrop, adverting to the facts of the present case, it is to be noticed

that in the first instance, the petitioner was served with the notice dated 17.7.14 containing the allegation that he has not been able to collect the requisite quantity of LPH from the number of the opium cultivators of various villages in the group area assigned to him i.e. Vallabhnagar-I and therefore, he must do the needful and collect the requisite quantity of LPH from opium cultivators within a period of one week, failing which legal proceedings shall be initiated for breach of conditions of license. It is also not in dispute that in response to the notice vide reply dated 25.7.14, the petitioner apprised the District Excise Officer that out of 239 cultivators of the area, 39 cultivators have destroyed their crops of LPH and the remaining cultivators of the area are not handing over the requisite quantity of LPH, stating that the same having been eaten away by the Blue Bulls are not available with them. The petitioner also requested for help at the departmental level so as to make it possible to collect the requisite quantity of LPH from the defaulting cultivators. In this regard, the petitioner had furnished the list of the cultivators, who did not supply the requisite quantity of LPH despite demand being raised on the strength of the license issued in his favour.

18. It is not the case of the respondents before this court that any assistance was provided to the petitioner to do the needful and collect the requisite quantity of LPH from the cultivators. Be that as it may, even in the F.I.R. lodged against the petitioner on 6.8.14, for commission of the offence under Section 26(d) of the Act, the allegation levelled was that the petitioner did not collect the LPH from 201 opium cultivators of 11 villages in the area Vallabhnagar-I, which is an act done in breach of Condition No. 15 of the conditions specified by the Department of Finance (Excise), Govt. of Rajasthan vide letter dated 8.5.14, constituting an offence punishable under Section 26(d) of the Act.

19. Suffice it to say that at no stage of the proceedings, there was an allegation levelled against the petitioner that though he collected the LPH quantified at 131.81 quintals from 201 cultivators, yet did not deposit the same in Wholesale/Bonded Warehouse and sold the same in the market in illegal manner.

20. Coming to the application of the petitioner dated 16.9.14 sent to the Excise Commissioner, Udaipur, it is to be noticed that the petitioner preferred the said application praying for compounding of the offence under Section 26(d) of the Act, wherein all that he has pleaded is that he being a new entrant in the business of LPH could not purchase the LPH from the opium cultivators before 31.7.14, despite instructions issued by the department in this regard.

21. It is pertinent to note that as per provisions of Section 26(d), the act of the holder of any licence/permit or authorization granted under the Act or any rule or order made thereunder is punishable if he does such act willfully and knowingly in breach of conditions of licence, permit or authorization for which a penalty is not prescribed elsewhere in the Act. In this view of the matter, even if the admission of the petitioner as contained in the application dated 16.9.14 is taken into consideration, by no stretch of imagination, an inference could be drawn that he admitted the guilt in terms that the breach of the conditions of the license on

his part is deliberate and willful.

22. It is a common ground between the parties that the Excise Commissioner has no jurisdiction whatsoever to deal with the application for compounding of the offence. The matter regarding the offence being committed by the petitioner under Section 26(d) of the Act, is still pending investigation and therefore, even if the compounding of the offence is permissible under the law before the court of competent jurisdiction, at this stage, the question of compounding of the offence does not arise.

23. It is not disputed before this court that the petitioner had made application for compounding of the offence under Section 26(d) and for no other purpose, however, the order impugned has been passed by the Additional Excise Commissioner, Udaipur, solely on the basis of the alleged admission of guilt on the part of the petitioner as set out in the application dated 16.9.14 and the statements of the witnesses recorded during the investigation of the criminal case, which were never made available to the petitioner and could not have been used for holding the petitioner guilty taking whatever stated by such witnesses as gospel truth.

24. It is to be noticed that as per mandate of Rule 36 of the Rules, any license granted may be revoked by the licencing authority or by any authority to which the licensing authority is subordinate if the holder or any person in his employment is found to have committed a breach of the conditions thereof or of any other provisions of the Act or the Rules. But then, such revocation cannot be made until the holder of the license has been given a reasonable opportunity of showing cause against the action proposed to be taken. It is not disputed before this court that no proceedings in terms of Rule 36 of the Rules were ever initiated against the petitioner and he was ever apprised about the proposed action of revocation of license prior to passing of the order impugned dated 1.12.14.

25. In the instant case, the glaring fact is that the petitioner has been held guilty of the allegation never levelled against him and subjected to the penalty, which was never contemplated even while issuing the notice dated 17.7.14, pointing out the alleged breach. As noticed hereinabove, the allegation against the petitioner throughout was that he failed to collect the requisite quantity of LPH from the opium cultivators of the area allotted to him under the license and there was no such allegation that the petitioner had collected LPH in the quantity specified from 201 cultivators of the area but after collection, did not deposit the same in the approved Wholesale/Bonded Warehouse. Further, even if it is assumed for the sake of argument that the admission made by the petitioner by way of application dated 16.9.14 regarding the breach of condition of the license in not collecting the requisite quantity of LPH from the opium cultivators is treated to be unqualified, it cannot be presumed that the authority concerned would have necessarily passed the order cancelling the license, forfeiting the security deposit and withholding of the bank guarantee based on the allegation alleged to have been proved, taking into consideration the admission of the guilty

on the part of the petitioner inasmuch as, Rule 36 of the Rules empowering the Licensing Authority or any other to which the Licensing Authority is subordinate, in no manner mandates that in all the cases where holder of the license is found to have committed a breach of conditions thereof or of any other provisions of the Act and the Rules, the revocation of the license would be a natural consequence thereof. Moreover, before passing an order, the stand of the petitioner that despite the efforts being made, the cultivators did not make available the requisite quantity of LPH, was required to be considered by the authority concerned objectively and could not have been brushed aside without consideration.

26. Strangely enough, while passing the order impugned revoking the license issued in favour of the petitioner, the cost of 131.81 quintal LPH equal to the sale price has been ordered to be recovered from the petitioner and further acting absolutely without jurisdiction, the directions have been issued to complete the investigation and file the challan against the petitioner for commission of offence under Section 26(d) of the Act. The order impugned passed by the Additional Excise Commissioner, which has an effect of influencing the fair investigation to be conducted by Investigating Officer suffers from vice of inherent lack of jurisdiction.

27. Thus, on the facts and in the circumstances of the case, this court is of the considered opinion that on account of the notice setting out the allegations and proposed action not being issued to the petitioner in terms of the provisions of Rule 36 of the Rules, a serious prejudice has been caused to the petitioner, he stands deprived of fair opportunity to defend the allegations levelled and therefore, the order impugned passed in gross violation of principles of natural justice, is not sustainable in the eyes of law.

28. Lastly, coming to the contention of learned counsel appearing for the respondents that in view of the availability of the remedy of appeal under Section 9A of the Act of 1950, the petitioner cannot be permitted to invoke the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India, it is to be noticed that in the instant case, the order impugned has been passed in exercise of the power conferred under the Rule 36 of the Rules and not under the Act of 1950 and therefore, Section 9A of the Act of 1950, which provides for remedy of appeal against the order passed under the Act of 1950, are not attracted in the matter. Of course, the order passed in exercise of Rule 36 of the Rules, is appealable under Rule 58 of the Rules before the Commissioner of Excise. But then, the rule of exclusion of the writ jurisdiction on account of availability of alternative remedy is a rule of discretion and not the rule of compulsion and therefore, the availability of remedy of appeal under the Rules, in no manner, fetters the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India, moreso, when the impugned action of the authority is found to be in gross violation of the principles of natural justice. In this view of the matter, this court is not inclined to relegate the petitioner to the

remedy of appeal available under the Rules.

29. In the result, the writ petition succeeds, it is hereby allowed. The impugned order dated 1.12.14 passed by the Additional Excise Commissioner, Udaipur Zone, Udaipur and NIT dated 2.12.14 issued by the District Excise Officer, Bikaner are quashed and set aside. The license issued in favour of the petitioner shall stand restored. However, the respondents shall be at liberty to take appropriate proceedings against the petitioner afresh in exercise of the power conferred under Rule 36 of the Rules, after issuing a proper notice setting out the allegations against the petitioner in detail. Needless to say that on fresh proceedings, if any, being initiated, the authority concerned shall pass a speaking order, after giving a reasonable opportunity of hearing to the petitioner, in accordance with law. No order as to costs.