
(2015) 08 CAL CK 0015
In the Calcutta High Court
Case No : Writ Petition 22905 (W) of 2014

Gopal Garai

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 11-08-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 47

Citation : (2015) 08 CAL CK 0015

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Abhijit Chakraborty and Tanmoy Chatterjee, for the Appellant;
Abhrotosh Majumder, Govt. Pleader and Prithu Dudhuria, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Dipankar Datta, J—The petitioner applied for a foreign liquor "on" shop licence on July 6, 2006. The application not having been considered despite sufficient time having lapsed since the making thereof, the petitioner had the occasion to approach this Court by presenting a writ petition [W.P. 3516(W) of 2010]. Prayer was made for a mandamus on the respondents to issue licence in favour of the petitioner. The writ petition was dismissed by a coordinate Bench by an order dated September 6, 2011, expressing hope and trust that the petitioner's application would be disposed of in accordance with law as and when his turn arrives. Pursuant to such order, the petitioner's application was considered by the Superintendent of Excise, Burdwan East Area, Burdwan and was rejected by an order dated December 23, 2011. It was noticed by the superintendent that during the pendency of the petitioner's application for licence, the relevant rules contained in Govt. Notification No. 800-EX dated July 29, 2003 had undergone changes vide promulgation of Govt. Notification No. 127-EX dated February 11, 2010 and as such, the application could not be considered in the light of the former notification. It was, however, observed that the petitioner was free to

apply afresh in the light of the prevailing rules i.e. the notification dated February 11, 2010. The order of the superintendent was subjected by the petitioner to challenge in a fresh writ petition [W.P. No. 155 (W) of 2012]. The learned judge who had considered the petitioner's earlier writ petition disposed of the writ petition by an order dated January 11, 2012 by relegating him to the appellate authority under the rules. A writ appeal was pursued by the petitioner unsuccessfully before the Division Bench. However, he was given two weeks' time to prefer an appeal in terms of the liberty granted by the order dated January 11, 2012. Availing the leave granted by the Division Bench, the petitioner did prefer an appeal before the Excise Commissioner, i.e. the appellate authority. According to the petitioner, the appellate authority had to be activated by another order of the writ court dated January 17, 2014 in W.P. No. 32608(W) of 2013 to dispose of the appeal. In compliance with the said order, the petitioner was extended opportunity of hearing and ultimately the appeal has been dismissed by the appellate authority vide order dated April 8, 2014. Before the appellate authority, it was contended on behalf of the petitioner that his application for licence ought to be considered in accordance with the rules which were in vogue on the date it was made. The appellate authority noted that although the existing rules, as amended in 2010, would not have retrospective effect but since the same was made in supersession of the previous rules it was not possible for him to consider the application under such previous rules. The appeal was, accordingly, disposed of without interfering with the order passed by the superintendent. The said appellate order is the subject matter of challenge in this writ petition.

2. Mr. Chakraborty, learned advocate for the petitioner, placed reliance on the decision of the Supreme Court reported in Punjab Tin Supply Co., Chandigarh and Others Vs. Central Government and Others, AIR 1984 SC 87 : (1983) 2 SCALE 503 : (1984) 1 SCC 206 : (1984) 1 SCR 428 : (1984) 16 UJ 9 and invited my attention to paragraph 17 thereof reading as follows:

"17. All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the Court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not."

3. He argued on the authority of the said decision that the contents of Govt. Notification No. 127-EX dated February 11, 2010, as amended, would have prospective effect and the authorities grossly erred in law in applying the terms

of such notification to negate the petitioner's claim for licence. Reliance was also placed by him on the decision reported in *State of West Bengal and Another Vs. West Bengal Foreign Liquor Manufacturers Wholesalers and Bonders Association and Another*, (2011) 1 CHN 217 for the proposition that administrative action should be devoid of arbitrariness, and the decision of the Supreme Court reported in *Sukhnandan Saran Dinesh Kumar and Others Vs. Union of India (UOI) and Others*, AIR 1982 SC 902 : (1982) 1 SCALE 165 : (1982) 2 SCC 150 : (1982) 3 SCR 371 : (1982) 14 UJ 503 for the proposition that if law imposes any restriction on the carrying of any trade, the burden of sustaining such restriction is on him who seeks to support it.

4. He, accordingly, prayed for setting aside of the appellate order as well as the original order refusing to grant him licence and for a direction on the respondents to issue licence immediately.

5. Mr. Majumder, learned Government Pleader vehemently opposed the writ petition. According to him, the decision in *M/s. Punjab Tin Supply Co. (supra)* although lays down a proposition of law which is unquestionable, the same would have no application on facts and in the circumstances in view of other decisions of the Supreme Court governing grant of liquor licences. He relied on the decisions reported in *State of Kerala and Another Vs. B. Six Holiday Resorts (P) Ltd. and etc.*, (2010) 2 JT 660 : (2010) 2 SCALE 839 : (2010) 4 SCR 1, *State of Kerala and Others Vs. Kandath Distilleries*, (2013) 3 AD 565 : AIR 2013 SC 1812 : (2013) 3 JT 275 : (2013) 3 RCR(Criminal) 494 : (2013) 2 SCALE 789 : (2013) 6 SCC 573 : (2013) AIRSCW 1640 : (2013) 2 Supreme 111 and *Somdev Kapoor Vs. State of West Bengal and Others*, (2013) 200 ECR 139 : (2013) 12 SCALE 434 : (2014) 2 SCJ 773 for contending that the orders impugned are unexceptionable. He, thus, prayed for dismissal of the writ petition.

6. Having heard the learned advocates for the parties and considering the materials on record, the only point of law that arises for consideration is whether the application for licence dated July 6, 2006 ought to have been considered and disposed of in accordance with Govt. Notification No. 800-EX dated July 29, 2003 or Govt. Notification No. 127-EX dated February 11, 2010, as amended.

7. Perusal of paragraph 17 of the decision in *M/s. Punjab Tin Supply Co. (supra)* would reveal that a law that is not made operative with retrospective effect would operate prospectively and that there is a presumption against retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. In the present case, the application of the petitioner was pending at the time of change of rules. The first time the petitioner approached the writ court was after the changed rules had come into force. Mere pendency of an application for licence before the superintendent does not create any right in favour of the petitioner and, therefore, question of affectation of any vested right by reason of introduction of the changed rules did not occur. If indeed the application for licence deserved consideration on the basis of Government Notification No. 800-EX dated July 29, 2003, the petitioner

ought to have obtained an order from the learned Judge, who dismissed his writ petition on September 6, 2011, to this effect that "according to law" would mean the law on the date the application for licence was filed. There being no such specific order of the learned Judge and Government Notification No. 127-EX dated February 11, 2010 having come into force by the time the writ petition was dismissed, the expression "according to law" would mean the law governing the field of grant of licence as on September 6, 2011, which is none other than the said notification. Mr. Majumder is right in his contention that the decision in M/s. Punjab Tin Supply Co. (supra) or the other two cited decisions do not come to the aid of the petitioner.

8. It would be relevant at this stage to note what the Supreme Court has laid down in the decisions that have been cited by Mr. Majumder.

9. In B. Six Holiday Resorts Private Limited (supra), the issues that arose for consideration are noted in paragraph 16. The first issue being relevant is quoted hereunder:

"16. Two issues arise for consideration on the contentions urged:

Whether an application for grant of FL-3 licence should be considered with reference to the Rules as they existed when the application was made or in accordance with the Rules in force on the date of consideration?"

Referring to earlier decisions of the Supreme Court, it was ultimately held as follows in paragraph 22:

"22. Where the rules require grant of a licence subject to the fulfilment of certain eligibility criteria either to safeguard public interest or to maintain efficiency in administration, it follows that the application for licence would require consideration and examination as to whether the eligibility conditions have been fulfilled or whether grant of further licences is in public interest. Where the applicant for licence does not have a vested interest for grant of licence and where grant of licence depends on various factors or eligibility criteria and public interest, the consideration should be with reference to the law applicable on the date when the authority considers applications for grant of licences and not with reference to the date of application."

10. In Kandath Distilleries (supra), the Supreme Court had the occasion to consider the point as to whether a writ of mandamus under Article 226 of the Constitution directing the State to part with its exclusive privilege in the matter of grant of licence for establishing distilleries under two local enactments in operation in the State of Kerala ought to issue. While dealing with the right to carry on trade or business in liquor, it was observed as follows:

"24. Article 47 is one of the directive principles of State policy which is fundamental in the governance of the country and the State has the power to completely prohibit the manufacture, sale, possession, distribution and consumption of liquor as a beverage because it is inherently dangerous to human

health. Consequently, it is the privilege of the State and it is for the State to decide whether it should part with that privilege, which depends upon the liquor policy of the State. The State has, therefore, the exclusive right or privilege in respect of potable liquor. A citizen has, therefore, no fundamental right to trade or business in liquor as a beverage and the activities, which are *res extra commercium*, cannot be carried on by any citizen and the State can prohibit completely trade or business in potable liquor and the State can also create a monopoly in itself for the trade or business in such liquor. This legal position is well settled. The State can also impose restrictions and limitations on the trade or business in liquor as a beverage, which restrictions are in nature different from those imposed on trade or business in legitimate activities and goods and articles which are *res commercium*. ***"

Ultimately it was held as follows:

"36. We have gone through the Government Order dated 11-10-2006 in extenso and we are not prepared to say that the application of the respondent was rejected solely on the ground that the application dated 12-1-1987 could not be treated as an application put forward by a firm based on a partnership deed, which came into existence on 10-4-1991, as per Clause 3 of the partnership deed but on various other grounds as well. The State Government, in our view, has considered the respondent's application dated 12-1-1987 with regard to the conditions that existed in the year 1998. The Government Letter dated 28-6-1994 would indicate that, apart from the respondent, few other applications were also pending prior to the year 1994. Over and above, the State Government during the year 1998, from 3-2-1998 to 21-11-1998, had received 52 applications for establishing compounding, blending and bottling units in IMFLs in various parts of the State. The Excise Commissioner vide his letter dated 25-11-1998 had reported that there was an unprecedented flow of applications, that was the situation prevailing in the year 1998, a factor which was taken note of in not entertaining the respondent's application, whether it was submitted on 12-1-1987 or on 22-11-1998. We cannot, in any way, activate an out-modelled, outdated, forgotten liquor policy of 1998, in the year 2013, by a writ of mandamus.

37. We are, therefore, of the view that the learned Single Judge as well as the Division Bench of the High Court have overlooked those vital factors while issuing a writ of mandamus directing the State Government/Commissioner to grant distillery licence to the respondent for setting up of a new distillery in Palakkad District, thinking that the impugned order is nothing but old wine in new bottle. *****"

11. In *Somdev Kapoor* (supra), similar point was considered by the Supreme Court and for the reasons mentioned in paragraphs 11 to 14 it was held that the application of the respondent was required to be governed by the new rules, namely, the Rules of 2003 as amended in 2004 and not by the Rules of 1993 while dealing with the application for licence dated August 28, 1992.

12. Having regard to the law laid down in the aforesaid decisions, the conclusion is irresistible that the authorities under the Bengal Excise Act 1909 were required to consider the petitioner's application in terms of the rules prevalent on the date of its consideration and did not act contrary to law in rejecting the petitioner's application for licence, although they might have been negligent in not considering the said application on their own and did so only when prodded by this Court.

13. I am of the considered view that the writ petition does not set up any case for interference. It stands dismissed, without any order as to costs.

Urgent certified copy of this judgment and order, if applied for, may be furnished to the applicant at an early date.