(1994) 07 AHC CK 0041

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 257 of 1986

Jogendra Kumar APPELLANT

Vs

State of U.P.& Anr. RESPONDENT

Date of Decision : 11-07-1994

Acts Referred:
Uttar Pradesh Excise Act, 1910 — Section 34, 35

Citation : (1994) 07 AHC CK 0041

Hon'ble Judges : M.C.Agarwal, J

Final Decision : Allowed

Judgement

M.C.Agarwal, J.—This writ petition under Article 226 of the Constitution of India challenges an order dated 1st January, 1986, passed by the State of U. P. and a further writ directing the Excise Commissioner to refund the licencefee of Rs. 50,000 with interest.

2. I have heard the learned counsel for the petitioner and the learned standing counsel.

3. The case of the petitioner is that he was granted the licences for the wholesale vend of foreign liquor, called FL2 licences, for the excise year 198384 on 6th April, 1983 to sell the products of M/s. Medowell & Company and M/s. Central Breweries & Distillary. The vends were to be operated at Haldwani in the district of Nainital. The petitioner deposited Rs. 25,000 as a fixed licence fee for each of the two licences and also Rs. 15,000 each as security. After the grant of the said licences, on reaching Nainital the petitioner came to know that his partners hive included his name as a licensee in one of the shops for retail vend of foreign liquor. According to the Excise Rules person cannot be held both the licences i. e. FL2 and FL5, and, therefore, the petitioner immediately rushed back to Allahabad, and moved an application before the Excise Commissioner on 13th April, 1983, requesting that the FL2 licences aforesaid be granted in the name of his wife as he was not entitled to hold the FL2 liceuces in view of Para639 (2) of the U. P. Excise Manual. The petitioner also moved an application for the refund

of the fixed fee and security amounts. It is also contended that the wholesale licence (FL2) granted to the petitioner was not worked even for a day. The Excise Commissioner by an order dated 5th May, 1983, refunded the security of Rs. 30,000 for the two licence but no order for the refund of the licence fee of Rs. 50,000 was passed. The petitioner then filed a writ petition No. 5658 of 1983, for a writ of mandamus to the Excise Commissioner to decide the application of the petitioner for the refund of Rs. 50,000. The writ petition was allowed on 6th January, 1984 and in pursuance of the orders passed therein the petitioner moved a fresh application before the Excise Commissioner on 6th March, 1984. Still no orders were passed and the petitioner again filed writ petition No. 1698 of 1984 which was decided vide order dated 20th May, 1985 and this Court directed the Excise Commissioner to dispose of the representation of the petitioner on merits within six weeks of the petitioner placing a copy of the order before him. Thereafter, by an order dated 24th September, 1985, the Excise Commissioner rejected the petitioner''s application.

4. Against the order of the Excise Commissioner dated 24th September, 1985, the petitioner filed a revision petition before the State Government that has been dismissed vide order dated 1st October, 1986. The petitioner''s contention is that there was no breach of any term of the licence and, therefore, the amount of licence fee could not be forfeited under Section 34(1)(b) of the Act. It is contended that the licence could have been cancelled under Section 35 of the U. P. Excise Act, and in that event the petitioner was entitled to the refund of the amount of licence fee.

5. The respondents have filed a counter affidavit. The petitioner''s contention that it was only after the grant of FL2 licence that he came to know that his partners have included his name in FL5 licence, has not been denied by the respondents. Their case is that neither Section 34 nor Section 35 of the Excise Act, will apply because the Excise Commissioner did not cancel the licence and, in fact, the petitioner surrendered the licence himself and it was consequently determined. It is contended that Section 36 of the U. P Excise Act clearly bars the right of the petitioner to claim compensation and there is no provision for the refund of the licence fee.

6. It is common case of the parties that FL2 licence could not be granted to a person holding FL5 licence. The petitioner''s case was that when he applied for FL2 licence and till it was granted to him, he did not know that he has been granted FL5 licence alongwith his business associates and that it was later on reaching Nainital that he came to know that his name has been got included by his partners as FL5 licensee. These allegations are contained in paragraph3 of the petition and vide paragraph 3 of the counteraffidavit they have not been denied. It, therefore, stands established that while applying for the FL2 licence and till it was granted to him, the petitioner was unaware of the grant of the FL5 licence.

7. Section 34 of the U. P. Excise Act, contains the power to cancel or suspend the

licence. The circumstances under which a licence can be cancelled are mentioned as be low:

"(a) if any duty or fee payable by the holder thereof be not duly paid; or

(b) in the event of any breach by the holder of such licence, permit or pass or by his servants, or by any one acting on his behalf with his express or implied permission of any of the terms or conditions of such licence, permit or pass; or

(c) if the holder thereof is convicted of any offence punishable under this Act or any other law for the time being in force relating to revenue or of any cognizable and nonbailable offence, or of any offence punishable (under the Dangerous Drugs Act, 1930, or under the Merchandise Marks Act 1889), or of any offence punishable under Section 482 (both inclusive) of the Indian Penal Code; or

(d) where a licence, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(e) if the conditions of the licence or permit provide for such cancellations or suspension at Will."

8. Subsection (3) of Section 34 provides that where a licence is cancelled under this section, the holder shall not be entitled to any compensation for the cancellation or suspension of his licence.

9. Section 35 then contains further power to cancel licences whenever the authority granting the licence, considers that such a licence should be cancelled for any cause other than those specified in Section 34. If a licence is cancelled under Section 35, the Excise Commissioner is bound to remit a sum equal to the amount of fee payable in respect of the licence for 15 days. In case, the licence is cancelled forthwith without notice, Subsection (2) of Section 35 provides that the Excise Commissioner may order the licensee to be paid the sum as remitted aforesaid and in addition a further sum by way of compensation as he may direct.

10. Thus, a licence granted under the U. P. Excise Act, can be cancelled only under Section 34 or 35. In the counteraffidavit it has been asserted on behalf of the respondents that the Commissioner did not cancel the licence either under Section 34 or 35 but the petitioner having surrendered the licence himself it was determined. A copy of the Commissioner''s order by which the licences are alleged to have been determined was not annexed with the counteraffidavit to show in what manner the Commissioner dealt with the matter, the learned standing counsel on the other hand pointed out that the licence granted to the petitioner was cancelled under Section 34(l)(b) of the U. P. Excise Act, as the licensee had committed breach of the conditions of the licence by obtaining FL5 licence, and, therefore, in terms of subsection (3) of Section 34 the petitioner was not entitled to any compensation. This argument is against the plea set up in the counteraffidavit in which it was stated that neither Section 34 nor Section 35 was applicable. This shows that the respondents are finding it difficult to support

the action of the Commissioner in not refunding the amount of licence fee.

11. Subclause (b) of Section 34(1) could be invoked when there was a breach of the terms or conditions of the licence by the holder thereof. Copies of the licences in question have been filed by the petitioner with a supplementary affidavit and the correctness thereof was not disputed. The licences do not contain any terms or conditions that the grantee will not obtain any FL5 licence. Holding of an FL5 licence was according to the parties a legal disqualification for holding an FL2 licence and in my view, this legal requirement could not be treated as a term or condition of the licence. This was a prequalification independent of the terms of the licence alongwith several other qualifications regarding the authority to enter into a contract. Therefore, the condition that an FL2 licence would not be granted to a person who holds an FL5 licence is not a term or condition of the grant of FL2 licence and, therefore, subclause (b) of Section 34(1) could not be invoked. Section 35 contains the provisions under which a licence could be cancelled where Section 34 did not apply. The case of the present petitioner was one in which the licence could be revoked only under Section 35 which does not authorise the forfeiture of the licence fee for the unexpired period of the licence. In the present case the petitioner has admittedly not worked the licence even for a day and immediately on coming to know of his disqualification rushed to the Commissioner to grant the licence to his wife or else cancel the same and refund the deposits. The contention of the respondents that the licence has not been cancelled under Section 35 is not taxable.

12. There is no provision under which the Excise Commissioner could forfeit the entire licence fee. There is no allegation that because of the cancellation of the licence granted to the petitioner the State suffered any financial loss, The licence was not worked even for a day. Therefore, in my view, the petitioner was entitled to the refund of the whole of the licence fee i. e. Rs. 25,000 for each of the two licences.

13. For the above reasons, the writ petition is allowed and settingaside the order passed by the State Government and the Excise Commissioner, the respondents are directed to refund to the petitioner the sum of Rs. 50,000 with interest at the rate of 9% per annum from the date of deposit to the date of refund. This will be done within two months from the date a certified copy of this order is presented by the petitioner to the Excise Commissioner of U.P. The petitioner will also get his costs of this writ petition from the respondents which I assess at Rs. 2,000.

