(2022) 05 KAR CK 0011

In the Karnataka High Court

Case No : Writ Petition No. 5168 Of 2022 (EXCISE)

John Distilleries Pvt. Ltd — APPELLANT

Vs

Commissioner Of Excise, 2nd Floor Bmtc Building, A Block, Bmtc Shantinagar, Government Of Karnataka, Bengaluru ? 560027 & Others — RESPONDENT

Date of Decision : 12-05-2022

Acts Referred:

Trademarks Act, 1999 — Section 134
Karnataka Excise Act, 1965 — Section 2(7), 3
Karnataka Excise (Bottling Of Liquor) Rules, 1967 — Rule 15, 15(3), 15(3)(a), 15(3)(b), 15(3)(c), 15(3)(d), 15(3)(e), 15(3)(f), 15(3)(g)
Constitution Of India, 1950 — Article 217(3), 226

Citation : (2022) 05 KAR CK 0011

Hon'ble Judges : Jyoti Mulimani, J

Bench : Single Bench

Advocate : Dhananjay Joshi, Vachan H.U, Shwetha Krishnappa, Sreevatsa, Thomas Vellapally

Final Decision : Dismissed

Judgement

Jyoti Mulimani, J

1. Sri. Dhananjay Joshi learned Senior Counsel for petitioner and Sreevatsa, learned Senior Counsel for respondent No.2 and Smt.Shwetha Krishnappa, learned Government Advocate Respondent No.1 have appeared in person.

2. The material facts of this writ petition can be stated quite shortly as under:

It is stated that the petitioner is a reputed company engaged in a business of manufacture, sale, supply and export of alcoholic beverages under various brand names and one of the flagship brands of the petitioner is ‘Original Choice’. The brand original choice is a registered trade mark of the petitioner along with several other registered trademarks containing unique designs and graphical representations.

It is said that petitioner has been making improvisation in the packing and labelling of the brand over the years to make it more appealing. One such innovation in the labelling under Aseptic Brick Pack was approved by the office of the Commissioner of Excise, Bengaluru supplied through KSBCL in the State of Karnataka.

The Commissioner of Excise, Bengaluru published a notification on 22.10.2021 bearing NO.EDC/08/DST/ KOLAR/LABEL/2020-21 announcing that the second respondent had applied for approval of its label under the brand names, 'Green Choice Superior Whisky' and 'Black Queen Gold Whiskey' and calling up on other Distilleries to submit their objections. if any to these brand names and label within 21 days of the notification.

Noticing that the marks adopted by the second respondent in its label were deceptively similar to the petitioner's registered trademarks, the petitioner submitted detailed objections to the Commissioner of Excise- first respondent.

As things stood thus, on 29.11.2021 the Commissioner of Excise- first respondent addressed a letter to the Deputy Commissioner Kolar, directing him to investigate the objections filed in response to the notification and submit a report on or before 06.12.2021.

It is stated that on 04.01.2022, petitioner addressed a letter to the Commissioner of Excise specifically requesting for a personal hearing. However, without granting an opportunity for hearing, the Commissioner of Excise passed the order on 14.01.2022 thereby approved the second respondent's label.

Under these circumstances, the petitioner having left with no other of alternative and efficacious remedy has filed this writ petition under article 226 of the Constitution of India.

3. Sri. Dhananjay Joshi learned Senior Counsel appearing on behalf of petitioner submits that the order is illegal, arbitrary and contrary to law.

Next, he submitted that the order has been passed in breach of rules /principles of natural justice.

A further submission is made that the Commissioner of Excise has no adjudicatory powers under rule 15 (3) of the Karnataka Excise (Bottling of Liquor) Rules, 1967 (for short Rules 1967) to approve any label. It is submitted that the same was brought to the notice of the Commissioner that the proposed label is in violation of petitioner's intellectual property rights. Hence, the Commissioner ought to have directed the second respondent to address and resolve the petitioner's objections before seeking approval of its label.

Learned Senior Counsel vehemently contended that the Commissioner has failed to appreciate that the petitioner has a right to be heard and more so, when the petitioner has made a specific request in that regard.

It is urged that the trademark 'Green Choice' does not even belong to the second respondent. It is argued that one SNJ Distillers Private Limited has applied for registration of its trademark under the Trademarks Act, 1999, which application is being opposed by the petitioner. Moreover, the graphical designs in the petitioner's registered trademarks which are being copied by the second respondent are not even the subject matter of the application for registration of the trademark, Green Choice. The Commissioner has failed to appreciate that the second respondent's label has the essential features of petitioner's label and this will lead to deception and loss to the petitioner.

Learned counsel strenuously urged that the decision of approval of label is in clear violation of rules of natural justice. The Commissioner ought to have accorded a personal hearing to the petitioner.

Lastly, he submitted that viewed from any angle, the order is unsustainable in law and accordingly he submitted that appropriate writ may be issued to set aside the order.

To substantiate the contentions, learned Senior Counsel for petitioner has relied upon the following decisions:

1. (1973) 2 SCC 474 CHANDRIKA MISIR AND ANOTHER VS BHAIYA LAL.

2. 2021 SCC ONLINE SC 552; SAURAV JAIN AND ANOTHER VS A.B.P. DESIGN AND ANOTHER.

3. ILR 2020 KARNATAKA 4669 - PRADEEP KUMAR AND ANOTHER VS THE COMMISSIONER HINDU RELIGIOUS INSITUTIONS AND CHARITABLE ENDOWMENTS AND OTHERS.

4. (2003) 4 SCC 557 - CANARA BANK AND OTHERS VS DEBASIS DAS AND OTHERS.

4. The petition is opposed by the State and the second respondent.

5. Sri.Sreevatsa learned senior counsel appearing on behalf of second respondent justified the order.

Next, he submitted that the petitioner is the holder of the Trademark 'Original Choice' bearing Registration No. 722161 under class 33, while SNJ Distilleries Pvt. Ltd, is the applicant in application No. 4211097 dated 19.06.2019 under class 33 for registration of the mark 'Green Choice'.

It is also submitted that the petitioner has not been granted any trademark in respect of the disputed label for Original Choice. The same is evident from Annexure-D objections, and as on date, the registered trademark for Original Choice bears no resemblance whatsoever to the label of the second respondent.

A further submission is made that the second respondent has been using the brand 'Green Choice' as early as from 2019 in Andhra Pradesh without any opposition being raised by the petitioner before the Excise Authorities in Andhra Pradesh, and thereafter it also sought to get approval of its label 'Green Choice

Superior Whisky' as per Rule 15 (3) of the Karnataka Excise (Bottling of Liquor) Rules, 1967 for sale of liquor in Karnataka. Pending the registration of second respondent's trademark application, the second respondent is entitled under law to use the same. He relied upon the decision of the Bombay High Court in Consolidated Foods Corporation vs. Brandon and Company Private Ltd. reported in AIR 1965 Bombay 35 wherein, it has been held that right over a mark is obtained by use, and registration of a mark does not grant any special right to the holder.

It is submitted that the label 'Green Choice' was first granted approval by the Commissioner of Prohibition and Excise, Andhra Pradesh, Vijayawada as early as on 09.07.2019. Thereafter, on approval of its label by the Commissioner of Excise - first respondent, the second respondent has invested heavily in its production/ sale/promotion of the Green Choice Whisky in Karnataka.

Sri. Sreevatsa, learned Senior Counsel has also drawn the attention of the Court to Rule 15 (3) of the Karnataka Excise (Bottling of Liquor) Rules, 1967. Learned Counsel also submitted that the petitioner has invoked Rule 15 (3) of the Karnataka Excise (Bottling of Liquor) Rules, 1967 and whilst doing so, it has been contended by the petitioner that it has not been given an opportunity of being heard before the first respondent who granted permission to the second permission to affix his label which is in question.

It is specifically contended that natural justice; audi alteram partem Rule does not include oral hearing at all times. Under the Rules 1967, there is no provision for personal hearing except when the Commissioner proposes to cancel the approval for the label under 15B.

On facts, it is submitted that pursuant to Government Notification, all distilleries in Karnataka were informed and objections invited. The petitioner filed objections which were considered by the first respondent while granting permission for the label to the second respondent.

Learned Senior counsel strenuously urged that the first respondent has no jurisdiction to decide on whether there has been infringement or passing off. The jurisdiction is given to the District Court under Section 134 of the Trademarks Act, 1999. The contention of the petitioner that the marks adopted by the second respondent are deceptively similar to the petitioner's trademark and this issue cannot be decided under Article 226 of the Constitution of India.

Lastly, he submitted that an opportunity to be heard does not necessarily include a personal hearing. Further, Article 217 (3) of the Constitution of India does not guarantee the right of personal hearing. The present petition is devoid of merits and accordingly he submits that the writ petition may be dismissed.

Learned Senior Counsel relied upon the following decisions:

1. (1971) 1 SCC 396 - UNION OF INDIA (UOI) VS JYOTI PRAKASH MITTER.

2. AIR 1980 SC 808 - P.N. ESWARA IYER AND ORS. VS THE REGISTRAR, SUPREME COURT OF INDIA.

6. Smt. Shwetha Krishnappa learned Additional Government Advocate also justified the order. She submitted that the Excise Commissioner as defined under section 2(7) of the Karnataka Excise Act, 1965, is appointed as per Section 3 of the Act by the State Government to be Chief Controlling Authority in all matters connected with the administration of the Act. The Commissioner is vested with power under the Karnataka Excise Act and Rules framed thereunder.

Next, she submitted that the scope and power of the Excise Commissioner pertaining to labelling of liquor bottles is enumerated under Rule 15(3) of the Karnataka Excise (Bottling of Liquor) Rules, 1967. She has drawn the attention of the court to Rule 15 and submitted that the discretionary power is vested with the Commissioner to approve a suitable label containing description other than that found under rule 15 (3) (a) to (g).

A further submission is made that the petitioner has filed detailed objections on 12.10.2021. Upon receipt of the objections of the petitioner, the Excise Commissioner-the first respondent has considered the objections in detail and accordingly instructed the Deputy Commissioner of Excise, Kolar to furnish a report before 06.12.2021. Pursuant to which the Deputy Commissioner of Excise, Kolar submitted a report after detailed verification. The Commissioner of Excise - first respondent has acted within his jurisdiction and authority under the Excise Act and Rules. The Commissioner has also complied with due procedure established in law while passing the order.

Learned Additional Government Advocate vehemently contended that the petitioner herein in his objection dated 12.10.2021 did not seek for any personal hearing nor was there any question to the jurisdiction or authority of the Commissioner of Excise-first Respondent for grant of permission. It is only in the writ petition; such a contention has been taken for the first time and it is an afterthought.

She strenuously urged that opportunity to be heard does not necessarily include a personal hearing. The Commissioner has adhered to the principles of natural justice before passing the order.

Lastly, she submitted that the petition is devoid of merits and accordingly she prayed that the writ petition may be dismissed.

To substantiate the contentions, learned AGA has relied upon the following decisions:

1. (2011) 8 SCC 695 - ORIENTAL BANK OF COMMERCE AND ANOTHER VS. R.K. UPPAL.

2. (1996) 4 SCC 69 - UNION OF INDIA AND ANOTHER VS JESUS SALES CORPORATION.

3. (1971) 1 SCC 396 - UNION OF INDIA VS JYOTI PRAKASH MITTER.

4. (2011) 14 SCC 337 - NIVEDITA SHARMA VS CELLULAR OPERATORS ASSOCIATION OF INDIA AND OTHERS.

5. AIR 1964 SC 1419 - THANSINGH NATHMAL VS THE SUPERITENDENT OF TAXES, DHUBRI AND OTHERS.

6. ORA/143/2008/TM/CH - ALLIED BLENDERS AND DISTILLERIES VS JOHN DISTILLERIES LTD (JD).

7. Heard the contentions urged on behalf of parties and perused the writ papers with utmost care.

The lis involved in the writ petition pertains to the decision taken by the Excise Commissioner-the first respondent approving the second respondent's label, 'Green Choice Superior Whisky' for bottling and sale of liquor in terms of Rule 15 (3) of the Karnataka Excise (Bottling of Liquor) Rules 1967.

Suffice it to note that the petitioner has challenged the order on the ground that sufficient/adequate opportunity of hearing was not afforded. The principal ground on which the Court is asked to quash decision is that there has been a breach of the rules of natural justice, in particular it is said that the petitioner has been denied of a fair and personal hearing.

In the backdrop of the specific contentions, the short and real questions that require consideration are:-

1. Whether there is a breach of rules/principles of natural justice?

2. Whether order of Certiorari to quash the decision be granted?

Before I answer the point, let us quickly glance the Principles and Rules of Natural Justice.

In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. There is, therefore, a bewildering variety of administrative procedure. Sometimes the statute under which the administrative agency exercises power lays down the procedure which the administrative agency must follow but at times the administrative agency is left free to devise its own procedure. However, courts have always insisted that the administrative agencies must follow a minimum of fair procedure. This minimum fair procedure refers to the principles of natural justice.

Rules of Natural Justice have developed with growth of civilization and the content thereof is often considered as a proper measure of the level of civilization and Rule of Law prevailing in the community.

Natural Justice is another name for common sense justice. Rules of natural justice are not codified canons. They are principles ingrained in the conscience of man. Justice is based substantially on natural ideals and values which are universal. Natural Justice is not circumscribed by linguistic technicalities and grammatical niceties or logical prevarication. It supplies the omission of a formulated law. It is the substance of justice which has to determine its form. What particular form of natural justice should be implied and what its extent should be in a given case must depend to a great extent on the facts and circumstances of that case and the framework of the statute under which action is taken.

The expression 'natural justice' and 'legal justice' do not present a watertight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this purpose, natural justice is called in aid of legal justice.

The basis of principles of Natural Justice is rule of law.

The two principles of natural justice are:

1. Nemo in propria causa judex, esse debet. -No one should be made a judge in his own cause, or the rule against bias.

2. Audi alteram partem. - Hear the other party, or the rule of fair hearing, or the rule that no one should be condemned unheard.

Hearing means natural justice or fairness. The question is: What are the norms of fair hearing? The concept of fair hearing or natural justice is elastic and is not susceptible of precise definition.

Hearing involves many components like notice, filing written objections/ representations, opportunity to be given to a party to present his case, legal representation, etc. These various components are not fixed but are flexible and variable, and their scope and applicability differ from case to case. The Apex Court has stated repeatedly, the principles of natural justice are not "embodied" rules; that there is no invariable standard of reasonableness in the matter of hearing and whether, in a particular case, natural justice has been contravened or not is for the court to decide. The courts are to be satisfied that the person against whom an action was taken had a fair chance of presenting his side of the case before the authority concerned. The decision of the courts on the question whether the individual concerned has had a reasonable opportunity of hearing or not in a particular situation depends ultimately upon the specific facts and circumstances of each case including the nature of the decision- making body, the nature of action proposed, the grounds on which the action is proposed, the material on which the allegations are based, the nature of plea raised by him in reply, the requests for further opportunity that may be made, his admissions by conduct or otherwise of some or all the allegations and such other materials as may help in coming to a fair conclusion on the question.

Fair hearing does not stipulate that proceedings be as formal as in a court. Natural Justice is simple or elementary justice as distinct from complex or technical justice.

I hope this introduction sets the scene sufficiently to enable me now to turn to the petitioner’s primary attack on the breach of rules of natural justice.

As already noted above, the writ petition is filed challenging the order/decision of the Excise Commissioner on the main ground that personal hearing was not accorded to the petitioner by the Commissioner of Excise - first respondent while approving the second respondent’s label.

The petitioner has contended that the approved label of second respondent is identical to the label and registered trademark of the petitioner’s ‘ Original Choice’. The petitioner has specifically sought a direction to grant an opportunity of personal hearing.

It is contended on behalf of second respondent that it has been using the brand ‘Green Choice’ as early as from 2019 in Andhra Pradesh without any opposition raised by the petitioner. It is said that the second respondent also sought to get approval of its label ‘Green Choice Superior Whisky’ as per rule 15 (3) of the Rules 1967 for sale of liquor in Karnataka. The Commissioner of Prohibition and Excise Andhra Pradesh, Vijayawada as early as 09.07.2019 appears to have granted approval for the label ‘Green Choice’. Thereafter, the Commissioner of Excise - first respondent has accorded approval.

Suffice it to note that pursuant to the Government Notification, all distilleries in Karnataka were informed and objections were also invited. The petitioner has filed detailed written objections. It is interesting to note that in the objections, the petitioner has stated that he has no objection for the name ‘Green Choice’. The Excise Commissioner in extenso considered the objections.

Annexure- A is the order dated 14.01.2022. It is the order passed by the Excise Commissioner. I have perused the same with utmost care. A bare perusal of the order would in fact depicts that the Excise Commissioner has not only considered the written objections filed on behalf of the petitioner but also considered objections filed on behalf of one more distillery namely M/S Allied Blenders Distilleries Private Limited. The written objections have been considered. The decision-maker has observed rules of natural justice and has not infringed rules/ principles of natural justice before passing the order.

As is well known, a fair “hearing” does not necessarily mean that there must be an opportunity to be heard orally. In some situations, it is sufficient if written objections/representations are considered. In the present case, written objections/representations filed on behalf of petitioner have been well considered before taking a decision.

Suffice it to note that oral hearing is not regarded as an essential part of natural justice that in every case there should be oral hearing. Natural justice does not necessarily predicate an oral hearing unless the context requires otherwise. It is the requirement of natural justice that quasi-judicial and administrative bodies cannot make a decision adverse to the individual without giving him an effective opportunity of meeting any relevant allegations against him, but it does not have to be a personal hearing. Hearing can be done by written representation.

It is needless to observe that a person who is entitled to be heard orally, or who is given an oral hearing as a matter of discretion under a power conferred by statutory or other formal rules, must be allowed an adequate opportunity of putting his own case. He will normally be entitled to that opportunity, particularly where there is some dispute as to material facts or other matter on which oral argument will be of assistance to the decision-maker. The right to an oral hearing arises only when a person who is entitled to be heard orally. In the present case, the power of oral hearing is not conferred either by the statute or by the rules.

The Excise Commissioner has placed great emphasis on the written objections filed on behalf petitioner. The Excise Commissioner comprehensively dealt with the matter and has exercised the statutory power in right perspective. I may venture to say that he has not misdirected himself before taking the decision. I would wish to add that, it is in my opinion, that in the absence of a clear misdetection the court should be very slow to interfere with the discretionary power exercised by the Excise Commissioner unless there is a failure to comply with the provisions of the stature or rules. The statutory power has been exercised properly. To over-simplify again, the result is that there is no breach of rules of natural justice. Hence, the contention regarding breach of rules of natural justice must necessarily fail.

The present case does not even illustrate the circumstances in which it would be appropriate to subject a decision of Excise Commissioner to judicial review.

Finally, this approach is, I think, consistent with Preston v Inland Revenue Commissioners (IRC) [1985] 2 ALL E R 327 at 337-338, where Lord Templeman said:

‘Judicial review is available where a decision- making authority exceeds it powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers’.

The last argument advanced by learned Senior Counsel Dhananjay Joshi is with regard to the marks adopted by the second respondent are deceptively similar to that of the petitioner’s trademark there is an infringement of trademark.

I have considered the submission urged on behalf of petitioner. I refuse in this case to examine the details of the alleged infringement of the trademark and its consequence thereof. My reason is obvious that such an examination by this Court is outside the purview of Article 226 of the Constitution of India.

Counsel for the petitioner, State and second respondent have cited a number of cases, but I do not think that the law is in doubt. Each decision turns on its own facts. The present case is also tested in the light of the aforesaid decisions.

8. In the result, the writ petition is dismissed.

In view of the dismissal of the writ petition the interim order stands discharged.

