(2011) 05 CAL CK 0011

In the Calcutta High Court

Case No : M.A.T. No. 779 of 2010 and C.A.N. No. 10517 of 2010

Mahendra Shivlal Gandhi APPELLANT

Vs

State of West Bengal RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

Bengal Excise Act, 1909 — Section 86
Partnership Act, 1932 — Section 69

Citation : (2012) 2 CHN 380

Hon'ble Judges : Shukla Kabir Sinha, J;Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Kalyan Bandopadhyay, Joydeep Kar, Joytosh Majumder, S. Ghosh and S. Bandopadhyay, for the Appellant; Ashis Sanyal and Krishnendu Sarkar, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order and/or judgment dated 20th April 2010 passed by the Hon''ble Single Judge in W.P. No. 4716 (W) of 2006, dismissing the writ petition. The following prayers were prayed in the said writ petition:-

a) A writ in the nature of certiorari, do issue, quashing and/or setting aside the order dated 25th December, 2005 passed by the respondent No. 2 being annexure P/19 and the order dated 7th February, 2005 passed by the respondent No. 3 being annexure P/17 herein, forthwith.

b) A writ in the nature of Mandamus, do issue, commanding the respondent authorities to use his discretion in the matter of inclusion of names of the petitioners in the "F.L. Off" shop license in the name and style of M/s. New Wine Palace, forthwith.

c) Rule Nisi in terms of prayers (a) and (b) above.

d) Stay of operation of the order dated 25th December, 2005 passed by the respondent No. 2 being annexure P/19 read with the order dated 7th February 2005 passed by respondent No. 3 being Annexure P/17 till disposal of the present writ petition.

e) Ad-interim order in terms of prayer (e) above.

f) Costs to be paid by the respondents.

g) Such further order or orders as His Lordship may deem fit and proper

2. The facts of the case briefly are as follows:-

The case of the writ petitioner is that on 30th November 1980, Mahendra Shivlal Gandhi entered into a partnership with Dhirendra Kumar Vyas and Tushar Gandhi in the name and style of ''M/s New Wine Palace''. The retail business was in the name of Dhirendra Kumar Vyas, Tushar Gandhi and Mahendra Shivlal and they agreed to contribute capitals for the purpose of running the said ''off-shop'' business. From time to time, the partnership was constituted and new partners were inducted in the place of retiring partners. On 30th January, 1994 Dhirendra Kumar Vyas died. After the demise of Dhirendra Kumar Vyas the Excise Authorities transferred the said retail licence in favour of the respondent No. 6, Smt. Bhanumati Vyas, as legal heirs of said Dhirendra Kumar Vyas, since deceased.

3. After becoming the licensee Smt. Bhanumati Vyas expressed her intention to continue with the same arrangement and accordingly, a Deed of Partnership was executed on 8th November, 1994 and the existing partnership was reconstituted. Thereafter on 31st March, 1997 two partners i.e. J.P. Thakkar and Tushar Gandhi retired from the said partnership business and again by a Deed of Partnership the said partnership was reconstituted amongst Smt. Bhanumati Vyas, Suni D. Vyas and Mahendra Shivlal. In the year 1999 Jayshree Vyas retired from the said partnership and relinquished her all share in favour of Brijesh B. Byas and Kalpen Kumar Tripathy. Consequently, partnership was reconstituted and a deed was executed on 17th September, 1999 consisting of Bhanumati Vyas, Sunil D. Vyas, Brijesh B. Byas, Kalpen Kumar Tripathy, Gautam Jawaharlal Gandhi and Mahendra Shivlal.

4. It appears from the fact that Mahendra Shivlal was authorized to operate the Bank account of the partnership. On 30th April, 2003 Bhanumati requested the Manager of the said Bank i.e. Punjab National Bank, Kharajpur to stop the operation of the said current account of the partnership.

5. It is the case of the writ petitioner that the ''New Wine Palace'' was registered as a partnership firm under the Income Tax Act, 1961 and further used to make payment of West Bengal Sales Tax on profession, trade, ceiling etc. as a partnership firm. The said firm was registered with the West Bengal Sales Tax on Profession, Trade and Ceiling and Employment Act, 1979. The Income Tax Returns were also filed with the Income Tax Authority and Bhanumati used to file her return as a partner of the said firm and declared her share in the said firm. A

suit was instituted before the Court of Civil Judge (Senior Division), Medinipur, and an order of status quo was passed in respect of the business of ''M/s New Wine Palace''.

6. In these circumstances, the proceedings were initiated by the Excise Authorities of the District Paschim Medinipur issued a suspension order dated 22nd September, 2003. On an appeal being filed on 17th October, the matter was heard by the Excise Commissioner in the presence of all the parties. The Excise Commissioner was pleased to pass the following order:-

Modified my earlier order of keeping in abeyance the operation of order of A.D.M. (G) Paschim Medinipur issued order No. 548-R dated 22.9.03. The same is ordered and will be suspended.

7. Thereafter an appeal was filed before the Principal Secretary of the said department. On 25th March,. 2004 the appellate authority passed an order directing restoration of license and reopening the said ''Off-Shop''.

8. It is the case of the appellant, that the Principal Secretary while adjudicating the appeal against the interim order of the Excise Commissioner had disposed of and compounded the office of Smt. Bhanumati Vyas for induction of partners.

9. It appears that on 20th March, 2004 on an appeal being filed before this High Court on 28th September, 2004 the Division Bench of this High Court was pleased to quash the order of the Principal Secretary and remanded the matter to the Excise Commissioner with a direction to suspend the operation of the shop till the disposal of the matter. On 7th February, 2005, the learned Excise Commissioner was pleased to dispose of the said appeal directing Bhanumati to deposit a sum of Rs. 10,000/- u/s 60(1) of the Bengal Excise Act, 1919 in lieu of cancellation/suspension of her Excise Licence. It was further directed that the sum already deposited in this connection shall be adjusted towards disposition of the present appeal. The Additional District Magistrate (General), Paschim Medinipur was directed to open the IMFL ''Off-Shop'' immediately and further to consider the case of the writ petitioners for including them into the existing business as partners, if such proposal is forwarded to him and made under the existing rules. On 8th April, 2005 an appeal was preferred by the writ petitioners before the Principal Secretary. The said appeal was dismissed by the Principal Secretary.

10. A suit was instituted before the 1st Court of Civil Judge (Senior Division), Medinipore being Other Suit No. 165 of 2003 by the writ petitioners. The prayers made in the said suit are as follows:-

(a) for declaration that they are partners of the partnership firm "M/S NEW WINE PALACE" at 11, Railway Market Golebazar Kharagpur.

(b) for permanent injunction restraining the defendants Nos. 1 to 4 so that they may not obstruct the plaintiffs in their peaceful taking part in the business and to their entry to the business premises in any manner.

(c) for temporary injunction in terms of prayer (b).

(d) for receiver.

(e) For a decree against the defendants directing them to render accounts and to pass a decree of accounts and to appoint Account Commissioner.

(f) to pass final decree of accounts money.

(g) For declaration that the defendants nos. 5 and 6 have a right to cancel the licence in respect of the business in the name and style "M/s NEW WINE PALACE".

(h) for mandatory injunction directing the defendants Nos. 5 and 6 to issue licence in the names of all the partners of the firm and alternatively in the names of the plaintiffs.

(i) for costs, and for other legal and equitable reliefs.

11. The said suit is still pending.

12. It is contended on behalf of Bhanumati that she is the sole licensee in respect of the retail business of Indian Made Foreign Liquor ''off-shop'' run under the name and style of ''New Wine Palace''. She further pointed out that on 10th March, 2003 Mahendra Shivlal and writ petitioners made a prayer to the Additional District Magistrate (General) for entering their name as joint licensees in the excise license in respect of ''New Wine Palace'' alleging themselves to be the so-called partners of the said retail business. Objections were filed by Bhanumati. It is stated that none of the partnership deeds relied upon by writ petitioners were registered in accordance with the provisions of the Indian Partnership Act, 1932. Mahendra Shivlal and others were disqualified under the provisions of Excise Act. Hence show-cause notice was issued calling an explanation from her (Bhanumati) and the Excise Authority at the very threshold of the disputes summarily rejected the claim of the writ petitioners to be inducted as a joint licensees in respect of the licence issued in favour of Bhanumati. The said authority held that by making a Deed of Partnership without taking prior permission from the licence granting authority they have committed an act which is not permitted under the provisions of the Bengal Excise Act, 1909. Hence, writ petitioners filed the suit for declaration and the licence was suspended u/s 42 (a) of the Excise Act, 1993. Then the said order of suspension challenged before the Excise Commissioner and by an order dated 30th September, 2003 the Excise Commissioner was pleased to direct to open the said off-shop. It is further the case of the Bhanumati that the offence committed by the licensee (Bhanumati) was compounded by imposing a fine of Rs. 50,000/- u/s 65 of the Act and the said amount has duly been deposited with the Collector, Paschim Midnapore. It is further contended on behalf of Bhanumati that the writ petitioners are holding a licence for the sale of Foreign Liquor. The writ petitioners are holders F.I. Bond cum trade licence which is wholesale in nature as well as F.I. Retail licence and, therefore, they are disqualified u/s 12 of the Excise Act.

13. It is further the case of the respondent (Bhanumati) that after the order of the Excise Commissioner dated 17th February, 2005 enquiry has revealed that the writ petitioners have held more than one licence by making suppression of facts from the Excise authority. Therefore, they cannot get any order from the Court by suppressing such material facts.

14. It is further the case of the Bhanumati that u/s 65 of the Act, a power has been provided to the Excise authority to direct to pay composite money for any offence committed by the existing licensee. Compounding the offence alleged to be committed by the licensee u/s 42 can only be compounded under the provisions of section 65 of the said Act.

15. Section 54 of the Act does not empower the authority to induct any third party as a licensee. It is further pointed out that Rules 207 and 208 of the Bengal Excise Rules have been framed u/s 65 of the Act which deals with two aspects:-

(a) If at the time of settling the shop there is a prayer for grant of license in favour of the partnership the Collector may consider it.

(b) After the licence has been granted to a single person, the sole licence may have the liberty to transfer or sub-lease whether entire or partial and accordingly has to apply to the Department for an approval the Collector shall not allow such transfer or sub-lease unless good and sufficient reason be shown to his satisfaction and unless the transferee or sub-lessee is in his opinion, fir and qualified to hold such licence.

16. Therefore, there is no compulsion upon the licensee that she has to take partners. It is further stated that the said writ petitioners had no authority to act as a partner of the licensee. It is also stated that the partnership deeds are not registered in accordance with the provisions of the Indian Partnership Act, 1932 and, therefore, a suit is hit under the provisions of section 69 of the Partnership Act.

17. It is further pointed out that the Hon''ble Division Bench remanding the matter to the Excise Commissioner by an order dated 28th September, 2004 where the Division Bench held as follows:-

The matter is remitted to the Commissioner of Excise for a decision on merits. The Commissioner of Excise while deciding the matter need not be influenced by any observation made in this judgment. The Commissioner of Excise need not wait till the outcome of the suit. The validity of the license is in issue before him and the issue in the said is different.

From the facts and circumstances of the case and the materials on record, the commissioner of excise may decide whether or not the offence said to be committed by licensee Bhanumati is compoundable. If the Commissioner finds that the offence in this case can be compounded, the Commissioner may pass appropriate order by converting the sale license to a joint license in the facts and circumstances of the case. But the matter is left entirely to the discretion of the

Commissioner. The Commissioner may dispose of the matter pending before him after hearing the parties and by passing an appropriate reasoned order as early as possible preferably within a period of six weeks from the date of presentation of this judgment before him. Since the order dated 25th March, 2004 stands quashed, the running of the shop cannot continue, its running will depend on the order to be passed by the Commissioner. The order to be passed by the Excise Commissioner will not, in any way, affect the pending suit before the Civil Court.

18. The Hon''ble Division Bench was further pleased to direct that:-

In so far as the question of grant of excise license to the appellants in view of the provisions of Rule 12 of the said Rules is concerned, the same is to be decided by the Excise Authorities.

19. Therefore, it is submitted that the order passed by the said authorities are in accordance with the provisions of law and the appeal filed by the writ petitioner is without any merit and should be dismissed.

20. After hearing the parties and analyzing the facts it appears to us that the appellant writ petitioner did not approach the Excise authority for conversion of the said licence of Bhanumati into the partners'' names or into the name of the partnership firm or their names only as partners at any point of time until March 2004, although it has been stated that the first agreement was made way back in the year 1980.

21. It further appears to us that reconstitution of the partnership was made after the demise of Dhirendra, the husband of Bhanumati in the month of February, 1994. The writ petitioners/appellant did not take any steps nor any Clause was provided in the partnership for conversion of the said licence. Therefore, it appears to us that by such reconstitution no right was conferred on the partners to approach the Excise authority for conversion of the sole licence standing in the name of Bhanumati.

22. It further appears to us that no Clause was further entered into in the said second reconstituted partnership deed dated 1st April, 1997 and the same also did not contain any agreement regarding conversion of the off-ship licence. In the year 1999, nothing was also stated in the third reconstituted partnership deed. On the contrary, it was mentioned that Bhanumati agreed to treat her sole licence as an asset of the firm for her ailments and nothing more than that. Therefore, all these facts would show that at no point of time it was agreed between the partners and Bhanumati for conversion of Bhanumati''s sole licence into the joint names of the partners. It further appears to us that steps were taken only after the initiation of the proceedings by the ADM(G) against Bhanumati by issuing show-cause notice as to why her sole licence should not be suspended or cancelled for not obtaining prior permission from the Excise authority for entering into a partnership agreement.

23. It also appears to us that the Hon''ble First Court correctly assess the facts

and held as follows:-

After a lapse of about twenty three years from the date of the first partnership the petitioners found it convenient to pounce upon Bhanumati and as such approached the Excise Authority to convert her sole licence into the names of the partners, or rather, into their names as partners on the plea that the off-licence business of Bhanumati was, in fact, being run as a partnership on the basis of the partnership agreement. I think, the petitioners as so-called partners did not approach the excise authority independently for long twenty three years or could even ask Bhanumati to approach the Excise Authority for necessary conversion of the off licence into the joint names of the partners or their names as partners as none of the partnership agreements ever provided or provides any provision for such conversion.

24. The suit was also filed after lapse of 23 years on 22nd April, 2003 claiming that the petitioners are declared as partners of the partnership firm. Therefore, after analyzing the facts it appears to us that the Hon''ble Single Judge has correctly held as follows:-

However, having considered the above I fail to appreciate with any reasonable and rational approach as to how the petitioners could at this stage even claim that the off-licence should be converted into the names of the partners of the so-called partnership firm or rather in their names as partners even before the final adjudication of the said suit instituted by the petitioners themselves claiming the aforesaid declaration that the petitioners are the partners and mandatory injunction upon the Excise authority for conversion of the sole off-licence or rather issuance of off licence in the names of the partners of the firm or in the names of the petitioners themselves as partners. I also fail to appreciate at this stage as to how the petitioners could claim conversion of the off-licence into the joint names of the partners when none of the partnership agreements provides any clause or provision for such conversion of off-licence into the joint names of the partners or the petitioners as partners in the first place.

25. Therefore, it appears to us that until suit is decided in favour of the plaintiffs / writ petitioners herein, in our opinion, the writ petitioners can not ask the Commissioner of Excise for conversion of the sole licence of Bhanumati into the joint names of the partners/writ petitioners herein.

26. In the facts and circumstances of the case it appears to us that the Excise Authority under the Rules 207 and 208 of the Consolidated Rules made u/s 86 of the Excise Act, 1909 or under Rules 233 and 234 of West Bengal Excise Foreign Liquor Rules, 1998 were under any obligation to consider the case of the writ petitioners/appellant herein for conversion of licence standing in the name of Bhanumati until the civil suit is decided on merits.

27. Therefore, in these circumstances, it appears to us that the order passed by the said authority rejecting the appeal filed by the writ petitioners/appellant herein cannot be question or interfered with. We also find that His Lordship has

correctly assess the facts and also gave reasons for not coming to the conclusion that the authority was under no obligation to do so especially during the pendency of the Civil Suit for trial and final adjudication. It also appears to us that the reasons given in the said order and/or judgment of His Lordship are appropriate in the facts and circumstances of the case. We, therefore, find that the Commissioner and later the Principal Secretary have by their respective orders compounded the offence or so-called offence and allowed Bhanumati to carry on her business holding the licence in her own name as before and Bhanumati in due compliance had deposited the amount for the purpose of running the off-shop as before and, therefore, the said right of Bhanumati also cannot be questioned.

28. The question whether the partnership is registered or not has an impact under the provisions of Section 69 of the Partnership Act. However, we do not intend to make any observation with regard thereto since we feel that our observation may prejudice either parties in the pending suit. The party shall have liberty to take their point in the said suit. Before we part we also cannot brush aside the facts that the writ petitioners/appellants are holders of excise licences and that fact has been suppressed from the Court.

29. Hence, in our considered opinion and in the given facts, the order and/ or judgment of the Hon''ble Single Judge is a well reasoned judgment and does not suffer from any illegality and/or irregularity. Accordingly, we do not find any merit in this appeal.

30. For the reasons stated hereinabove, the appeal is dismissed.

31. Since the appeal is dismissed, the connected application for stay (being C.A.N. No. 10517 of 2010) has become infructuous and the same is dismissed accordingly.

32. Photostat certified copy of this judgment, if applied for, be supplied to the parties.

S. Kabir Sinha, J.

I agree.

