(2015) 07 PAT CK 0129

In the Patna High Court

Case No : CWJC No. 9127 of 2015

Manish Dwivedi APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 42

Citation : (2015) 4 PLJR 539

Hon'ble Judges : Ramesh Kumar Datta and A.K. Lal, JJ.

Bench : Division Bench

Advocate : Satyabir Bharti and Alok Chandra, for the Appellant; Vikash Kumar, for the Respondent

Judgement

Ramesh Kumar Datta, J.

I.A. No. 5773 of 2015

1. The interlocutory application has been filed for amending the prayer made in the writ application so as to seek quashing the licence issued in favour of respondent No. 5 for Group No. 37 shops in the district of Siwan for the remaining part of the Financial Year 2015-16 and direct its restoration in petitioner''s favour. Learned counsel for the petitioner submits that when the writ application was filed the petitioner was not aware of the licence having actually been issued to respondent No. 5 and the same has not been challenged. It is submitted by learned counsel that in any view of the matter if the initial order dated 22.6.2015 is quashed by this Court then any subsequent action of the respondents would automatically go away but by way of abundant precaution the petitioner seeks amendment of the prayer by way of the said interlocutory application.

2. In the aforesaid circumstances, the prayer for amendment is allowed.

3. I.A. No. 5773 of 2015 is accordingly disposed of.

4. Heard learned counsel for the petitioner, learned counsel for the State and learned counsel for respondent No. 5.

5. The petitioner seeks quashing of the order dated 22.6.2015 passed by the Collector, Siwan by which the licence of Group No. 37 retail liquor shops in the district of Siwan granted to the petitioner has been cancelled and a direction has been issued to settle the said licence with the second winner in the lottery and for quashing the licence granted to respondent No. 5 for Group No. 37 shops and for consequential directions.

6. The petitioner, respondent No. 5 and others pursuant to the Sale Notification issued by the Collector, Siwan filed their applications for settlement of retail liquor shops for the year 2015-16 and upon draw of lots the petitioner was declared successful in the draw of lots at Serial No. 1 and respondent No. 5 was placed at Serial No. 2. As per the Settlement Rules three lots are to be drawn and the successful candidates are placed seriatim and in case of failure of the drawee at Serial No. 1 to take settlement or cancellation of licence or for any other reason the benefit of settlement would go to the second successful candidate at Serial No. 2 and so on at Serial No. 3 if the occasion arises. The petitioner deposited the necessary fees and security amount and licence was issued in his favour. Thereafter on 27.3.2015 respondent No. 5 filed a complaint with the Superintendent of Excise alleging that the petitioner being a Government servant is disentitled to participate in the settlement. The Excise Superintendent by notice dated 28.3.2015 directed the petitioner to show cause as to why his settlement be not cancelled on the said ground. The petitioner replied to the same on 3.4.2015 denying the allegation stating that he was merely a Gramin Dak Sewak and not a Government servant, who is allowed to work for a maximum period of 5 hours in a day on a fixed allowance and the Rules itself provide that the Sewak should have other known source of income for himself and his family. In support of his stand relevant extract of Rules was also annexed to the show cause reply by the petitioner. Upon the said reply no further action was taken and the petitioner was continuing to operate the shop.

7. Thereafter it is alleged that respondent No. 5 came up with another complaint annexing forged and fabricated documents alleging that the petitioner has sold/ transferred his licence for a consideration of Rs. 11 lacs to one Shri Ajay Kumar Jaiswal. It is the stand of the petitioner that the complainant respondent No. 5 is an employee and agent of the said Ajay Kumar Jaiswal. The petitioner was directed by the Excise Superintendent by notice dated 9.5.2015 to file show cause and the petitioner replied to the same on 13.5.2015 denying the allegations and alleging that the agreement in question was a forged and fabricated document. The Superintendent of Excise directed the Sub-Inspector of Excise, Mairwan Anchal, Siwan to submit an enquiry report in the matter, who gave his report on 16.5.2015. In the report it was stated that the stamp paper which was dated 24.3.2015 was purchased in the name of Ajay Kumar Jaiswal and further the agreement shows that it has been witnessed by two persons and

he contacted both the persons personally, who in the course of enquiry accepted that the agreement was prepared in the presence of both the purchaser and the seller and the witnesses signed in their presence. They also gave their written application in this regard. Thereafter on the basis of the said enquiry report the Excise Superintendent by notice dated 20.5.2015 directed the petitioner to show cause as to why his licence be not cancelled in terms of Section 42 of the Bihar Excise Act. The petitioner in his reply dated 22.5.2015 again completely denied his hand in the preparation of the said document and alleging that everything from the purchase of the stamp paper till the presence of witnesses were in the personal knowledge only of the said Ajay Kumar Jaiswal and he has not made any signature on the stamp paper rather the signatures were forged. He further alleged that the witnesses were men of Ajay Kumar Jaiswal and respondent No. 5 and under conspiracy they have prepared the same. The petitioner filed another application on 27.5.2015 stating that he in fact is personally operating his retail shops and making all the transactions with the department which can be verified by the department. Thereafter by notice dated 5.6.2015 the Collector, Siwan directed the petitioner to show cause on the ground that he was a Government servant and further he had sold the excise shop for Rs. 11 lacs, as to why his licence should not be cancelled under Section 42 of the Act. The petitioner again submitted his reply stating what he had stated earlier. However, by the impugned order dated 22.6.2015 the Collector, Siwan cancelled the licence of the petitioner holding that the Excise Superintendent got an enquiry made in which the enquiring officer had found that the signature made on the agreement paper and the signatures of the two witnesses were correct and further that on a comparison of the signature of the petitioner on the settlement register with his signature in the agreement paper both the signatures were found to be identical and, accordingly, the licence of the petitioner was cancelled and the Excise Superintendent, Siwan was directed to settle the Group No. 37 shop with the second candidate in the draw of lot.

8. Learned counsel for the petitioner submits that the enquiry has been conducted in a most perfunctory manner, thereby violating the basic principles of fair enquiry. It is submitted that the entire finding is based upon the report of the Excise Sub-Inspector who relied upon the version of the two witnesses. It is urged by learned counsel that from a perusal of the alleged agreement it is evident that neither the parentage nor the addresses of the two witnesses were given therein, yet the Excise Sub-Inspector recorded the statement of the two witnesses.

9. It is further submitted that no proper enquiry has been held for verification of signatures of the petitioner on the alleged agreement despite specific denial by the petitioner in that regard that it was not his signature and it was a forged and fabricated document. It is contended that neither the Sub-Inspector of Excise nor the Collector is a handwriting expert who could on his own come to a conclusion regarding correctness or otherwise of the signature and any opinion could only have been given on the basis of a report of a handwriting expert which has not

been done this case.

10. It is further submitted by learned counsel that the kingpin of the entire conspiracy Ajay Kumar Jaiswal and the respondent No. 5 have not been examined in the matter by the enquiring officer or by the Excise Superintendent or the Collector in order to enter into the truth of the matter as also by enquiring into the mode and manner of payment of Rs. 11 lacs.

11. It is also contended by learned counsel that enquiry as to the actual operation of the shop as was asserted by the petitioner in his application dated 27.5.2015 has also not been made which would have gone to the root of the matter.

12. Learned counsel further submits that the original agreement has not been brought on the record and no opinion could have been expressed even by handwriting expert that the original agreement was executed by the petitioner on verification of the signatures on it, but the same has been done by the Collector, Siwan being a layman.

13. Learned counsel further submits that conspiracy between Excise authorities and the respondent No. 5 is also clear from the fact that even before the order dated 22.6.2015 was communicated to the petitioner who was directly affected by the same, it was made known to respondent No. 5 who on the same date had admittedly deposited advance licence fee and other deposits as required.

14. Learned counsel for the State while generally supporting the action of the respondents is unable to meet the specific contention as to the expertise of the Collector in deciding on his own the identity of the two witnesses and signatures as a handwriting expert. He, however, asserts that as per his instructions the original agreement is available on the record.

15. Learned counsel for respondent No. 5, on the other hand, submits that respondent No. 5 is neither an employee nor an agent of the said Ajay Kumar Jaiswal, as has been alleged, and he had only acted on the basis of the information that he had received in the matter.

16. It is further submitted by him that even if a fresh enquiry is ordered then his licence for running the liquor shop should not be disturbed until the final result of the enquiry.

17. Learned counsel for respondent No. 5 also submits that against the impugned order the petitioner has alternative statutory remedy and thus the writ petition is not maintainable.

18. It is further submitted that the writ application raises disputed questions of fact which cannot be decided by this Court in writ jurisdiction and for the said reason also the writ application is not maintainable.

19. We have considered the submissions of learned counsels for the parties and the materials available on the record. It is true that under Section 42 of the Bihar

Excise Act, the Collector has authority to cancel the licence which has been transferred without permission of the licensing authority. However, since such cancellation visits the licensee with dire consequences, therefore, before cancellation proper enquiry ought to be held by the authority concerned. More so, when allegations are made repeatedly by the rival of the licensee who would be the direct and immediate beneficiary of any such cancellation of licence, as would happen under the present scheme of settlement where the second candidate in the draw of lots would have the retail shop settled in his favour in case of cancellation of licence of the first candidate in the draw of lots.

20. So far as the plea of alternative remedy being available to the petitioner is concerned, it is now well accepted proposition that mere existence of alternative remedy does not bar the writ jurisdiction of this Court where there has been violation in following a fair procedure. In this regard reference may be made to the decision of the Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, .

21. The other plea of respondent No. 5 is also fit to be rejected regarding the writ petition raising disputed questions of fact in view of the order we propose to pass. It is not intended to decide herein the validity or otherwise of the alleged agreement entered into by the petitioner, rather the only proposition to be considered by this Court is as to whether there has been fair and proper enquiry before cancellation was ordered by the licensing authority. Thus the said submission of respondent No. 5 is wholly irrelevant.

22. It is evident from a consideration of the facts narrated above that respondent No. 5 was bent upon to dislodge the petitioner on one ground or the other, as even before the financial year for the settlement had started he had by his complaint dated 27.3.2015 moved the authorities that the petitioner is a Government servant. His complaint has not been held to be correct at any stage even in the order of Collector which refers to certain enquiries made from the Superintendent of Posts from which nothing could emerge according to him. Thus there is no finding against the petitioner with regard to his being a Government servant which, prima facie, does not appear to be so.

23. So far as the other ground is concerned, in view of the stand taken by the petitioner, the same could not have been decided on the basis of the statement made by the two witnesses, in case of whom neither parentage nor address were mentioned in the agreement; despite the same the Sub-Inspector of Excise had conducted the enquiry and submitted his report against the petitioner in order to favour respondent No. 5 and the said witnesses also filed written application before him in support of the stand that the agreement had been prepared and signed in their presence.

24. The authorities have also not considered the fact, apart from the alleged signature of the petitioner on the stamp paper, as to whether the alleged agreement was actually acted upon or not and whether any consideration flowed

between the parties and on the date of inspection who was actually operating the shop in question. Neither of the witnesses appear to be men of the petitioner, although it is the normal practice that when two witnesses sign the document then one witness each is produced by the parties to the agreement, which does not appear to be the case in the present matter.

25. Moreover, this Court finds that no attempt was made to make enquiries from the said Ajay Kumar Jaiswal nor further enquiries were made as to the manner in which payment of Rs. 11 lacs, which is alleged to be consideration for the agreement, passed hands from the said Ajay Kumar Jaiswal to the petitioner.

26. It is trite that no final opinion can be drawn with regard to the signature by merely looking at it. The signature has to be examined by a handwriting expert, which has not been done in the present case, rather the Collector has sought to place himself in the position of an expert and tallied the signature of the petitioner on the settlement register and also on the agreement and found the same identical. In our view, it is not open to the authorities to decide such a serious issue in such a light manner. Such action of the respondents raises a serious suspicion that they were bent upon to benefit the respondent No. 5 at the cost of the petitioner. Thus, on a consideration of the aforesaid facts and circumstances, the writ application is allowed. The impugned order dated 22.6.2015 is quashed. All consequential actions of the respondents including the subsequent grant of licence to respondent No. 5 is also quashed and the respondents are directed to permit the petitioner to operate his licence forthwith within a period of one week from the date of production of a copy of this order by the petitioner. The respondents, however, shall have liberty to proceed afresh against the petitioner after holding a due enquiry in accordance with law and in the light of the observations made in this order.