(2005) 04 PAT CK 0073

In the Patna High Court

Case No : CWJC No. 3234 of 2005

Most. Premlata Gupta and Others APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 26-04-2005

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22, 45, 89, 89(2)(e), 90
Constitution of India, 1950 — Article 19(1)(g), 19(1)(g)(6)

Citation : (2005) 2 PLJR 670

Hon'ble Judges : Nagendra Rai, Acting C.J.;S.N. Hussain, J

Bench : Division Bench

Advocate : Devi Pal, Sudhir Singh and Satyabir Bharti, for the Appellant; R.K. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, A.C.J.

1. The petitioners who have admittedly been granted licence of wholesale for sale of India Made Foreign Liquor and beer (hereinafter referred to as IMFL) in Form-I of the Bihar Excise Act (hereinafter referred to as the Act) for the year 2002-05 and for the preceding four and more years, have filed the present writ application challenging the order dated 30.10.2004 passed by the Member, Board of Revenue in Board Darbhanga Case Nos. 221 and 224 of 2004 to the extent of direction contained in paragraph 7(2) of the order that the period for wholesale licence to vend in IMFL shall be five years only and the case where the licensee has completed five years as on 31.3.2005 be identified and a fresh settlement be made, for quashing the consequential direction of the Excise Commissioner, Bihar, Patna contained in letter No. 4158 dated 13.11.2004 addressed to all the District Collectors to implement the aforesaid direction and the consequential direction issued by the Collectors of Begusarai, Darbhanga, Motihari, Saran, Buxar, Bhojpur, Bhagalpur and advertisement issued by some of the Collectors in pursuance of the aforesaid direction for grant of wholesale licence for sale of

IMFL by issuance of an advertisement. The copies of the said orders have been annexed as Annexure-4 and Annexure-6, Annexure-7 and Annexure-8 respectively to the writ application. The question involved in this case is only one, i.e. whether any period is fixed for grant of wholesale licence for sale of IMFL or the licence can be renewed for year to year without any limit.

2. It is admitted fact that these petitioners have been granted wholesale licence for sale of IMFL to the retail dealers and they have been granted licence in Form-I. It is also admitted position that their licences were renewed from time to time and each of the licensee has been granted licence for a period for five years or more years. According to the current procedure under the Act the wholesale licences for sate of IMFL are granted for one year on payment of licence fee of Rs. 1.5 lacs and renewed annually on the conduct and management of the licensees found to be satisfactory in terms of the Board''s Instruction No. 101(3) issued in exercise of power conferred by Section 91 of the Act. The controversy arose because of the order passed by the Board of Revenue in a case that the wholesale licences for sale of IMFL are being renewed contrary to the provisions of the Act and the Rules beyond five years. It so happened that one Raj Kumar Yadav challenged the order of grant of wholesale licences for sale of IMFL in the district of Darbhanga granted in favour of Nand Kumar Gupta and Ravi Kumar Jaiswal and for issuance of fresh settlement notice. He challenged the cancellation on the ground that Nand Kumar Gupta and Ravi Kumar Jaiswal are transferee from the original transferee and there is no provision for transfer of licence under the Act. The Commissioner allowed the case and held that the licences cannot be renewed as there is no provision for transfer and directed that advertisement be issued for settlement in accordance with established norms and procedure. The licensees preferred revision case No. 221 and 224 of 2004 before the Member, Board of Revenue, Bihar, Patna and the Member, Board of Revenue upheld the order with modification by order dated 30.10.2004 and in paragraph 7(2) he observed that the renewal of the wholesale licence for sale of IMFL is being done contrary to the provisions of the Act and the Rules and in no case, the wholesale licence can be granted for a period beyond five years and accordingly the licensee for wholesale sale of IMFL who has completed five years or would complete by 31st March, 2005 be identified and steps be taken for fresh settlement by advertisement. Thereafter, the Excise Commissioner issued letter in pursuance of that observation and the Collectors are taking steps in accordance with the same and in cases where the licensee has remained for more than five years, steps are being taken for fresh settlement after advertisement.

3. Dr. Devi Pal, learned senior counsel appearing for the petitioners challenged the order of the Board of Revenue which is the main order, in pursuance of which subsequent orders have been issued on the following grounds.

The Board in a litigation between the two parties to which the petitioners are not connected, cannot issue a direction without affording the opportunity of hearing to the petitioners and on this ground alone, the direction is vitiated and the subsequent directions issued by other authorities fall on the said ground. He further submitted that the Board of Revenue has misunderstood the provisions of the Act and the Rules and accordingly, held that the wholesale licences cannot be renewed beyond five years. The licence is granted for one year and renewal is a fresh licence and as such it can be granted or renewed for unlimited period in view of the Board''s Instruction No. 101(3). In this connection, he mentioned that there being no specific provision to deal with wholesale licences and the provision applicable in a case of grant of retail licence is applicable and the same is admitted from the fact that even the authorities are taking recourse to the Board''s Instruction No. 101(3) which deals with retail licence and not wholesale licence. He also submitted that the case of grant of exclusive privilege and the grant of wholesale licence altogether are two different things; in case of grant of exclusive privilege, there is provision for grant of opportunity to raise objection before the grant of exclusive privilege whereas no such provision is there in case of grant of wholesale licence and the Board has wrongly relied upon Section 22 of the Act and accordingly wrongly held that for beyond five years, wholesale licence for sale of IMFL cannot be granted/renewed. He also submitted that the petitioners being ex-licensee has a legitimate expectation and that the same procedure will be valid for settlement of wholesale licence for sale of IMFL and by issuing a fresh advertisement, their legitimate expectation has been frustrated.

4. Learned Counsel appearing for the State combatted all the submissions and submitted that the Board has not issued any direction in paragraph 7(2) but only has reminded the authorities about the statutory provisions which were not being followed. It is not a new policy decision which is required to be notified or Gazetted in terms of Section 92 of the Act. Section 89 of the Act empowers the State Government to make Rules and Section 89(2)(e) provides that the State Government may make rules for regulating the periods for which licenses for the wholesale or retail vend of any intoxicant may be granted and the number of such licenses which may be granted for any local area and the Rule 44 of the Rules framed u/s 89 of the Bihar Excise Act, 1915 (hereinafter referred to as the Rules) provides that the licences will be granted for one year and in case of wholesale licence it cannot exceed beyond five years. In that view of the matter, the grant of original licence or renewal cannot exceed five years, the time limit fixed by the aforesaid Rules. According to him, the decision taken by the authorities are perfectly in accordance with the provisions of the Rules. He also submitted that there will no legitimate expectation against the policy decision and the statutory rules.

5. Before appreciating the points raised on behalf of the petitioners, it is to be mentioned that under the scheme of the Act, there is no specific provision governing grant of wholesale licence. Chapter VI deals with licenses, permits and passes which covers the retail sale of spirit or tan etc. However, Rule 44 of the Rules deals with licences for the wholesale or retail vend both. The said rule runs as follows:

44. Licences for the wholesale or retail vend of excisable articles may be granted for one year, from the 1st April, to the 31st March, subject to the following provisions;-

(1) Licences for the retail vend of country spirit, foreign liquor and spiced country spirit may be granted for any number of years up to three years, beginning on the 1st April, in cases where the Excise Commissioner considers this advisable.

(2) If any licence be granted during the course of the financial year, it shall be granted only up to the 31st March, next following.

(3) Season licences for the sale of either fresh or fermented tan may be granted for periods fixed by the Collector.

(4) Temporary licences may be granted to provide for the supply of excisable articles on temporary and special occasions e.g., fairs, regimental camps of exercise, etc., and shall be limited to the period during which such temporary or special occasions last.

(5) Wholesale licences for the supply and sale of excisable articles may be granted for any numbers of years not exceeding five, as the Board may decide in each case."

6. A bare reading of the Rule will show that it clearly provides that the period of wholesale or retail vend of excisable articles will only be for one year. With regard to retail vend licence, the maximum period fixed for which licence may be granted, is three years and with regard to wholesale licence, the same may be granted for any numbers of years not exceeding five. Thus, the rule is that wholesale licence to vend in excisable articles can be granted for one year. However, the maximum period provided for wholesale licence is five years.

7. If the argument of the Learned Counsel for the petitioners that the renewal means a fresh licence, is to be accepted in that case there is no need of provision of sub-rule (5) of Rule 44 of the Rules, because rule 44 of the Rules itself shows that the period of wholesale licence will be one year. So according to the harmonious construction the only reasonable view that can be taken is that in no case including the grant of original licence and renewal, the period can exceed beyond five years. This appears to be sound and reasonable approach.

8. There is no fundamental right to deal in excisable articles. The Government has power to regulate, restrict or totally prohibit the sale of excisable articles and that will not infringe Article 19(1)(g) of the Constitution of India for the simple reason that trade in excisable articles is different from other trade and the Apex Court has settled the matter that regulation in excisable articles cannot be challenged as violative of Article 19(1)(g) of the Constitution of India and any restriction put has a support of the regulatory provision contained in Article 19(1)(g)(6) of the Constitution of India.

9. Section 45 of the Act is relevant in this case which shows that no person to

whom any licence has been granted under this Act shall have any claim to the renewal of such licence. Thus, there being no fundamental right, there is no statutory right to claim renewal and if in this context the relevant provision of Rule 44 of the Rules is read, then it is clear that the total period to deal with wholesale licence to vend in excisable article, including original licence and renewal, cannot exceed five years.

10. Learned Counsel appearing for the petitioners however has relied upon the instruction issued by the Board u/s 91 of the Act, i.e. Board''s Instruction No. 101(3) which deals with retail shops. According to sub-rule (3), the settlement of a shop will continue with the existing licensee if his conduct and management during the year is found to be satisfactory. The instruction issued by the Board cannot supersede or have a upper hand, to the rules framed by the State Government and it will be subject to Rule 44 of the Rules. Even assuming that by practice Board''s Instruction No. 101 is being applied even with regard to wholesale licence it has to be read with Rule 44 of the Rule, which means that after grant of yearly lease, the lease will be renewed on satisfactory conduct and management subject to the period limit fixed by rule 44(5) of the Rules so far as wholesale licence to vend in IMFL is concerned. Any other interpretation will be contrary to the intention and spirit of the provisions.

11. Earlier there was a case between petitioner No. 1 and Shiv Kumar Bhagat with regard to grant of additional wholesale licence in favour of Shiv Kumar Bhagat and that matter went before the Supreme Court which is reported in (Shiv Kumar Bhagat Vs. State of Bihar and Others, . After reading of paragraph 17 it appears that it has been held that the provisions for grant of licence for retail sale of spirit etc. are being followed for grant of wholesale licence to vend IMFL. There also Rule 44(5) of the Rules was referred to in paragraph 17 and it was held that licences may be granted for any number of years not exceeding five as the Board may decide in each case. In this connection, it is relevant to quote paragraph 17 of the said judgment which runs as follows:

"It appears from Chapter VI of the Act that the provisions therein contained deal with grant of licence for the retail sale of spirit etc. The provisions of Chapter VI do not deal specifically with the grant of licence for wholesale vending in IMFL. However, Rule 44 refers to licences for the wholesale or retail vend of excisable articles and sub-rule (5) provides that wholesale licences for the supply and sale of excisable articles may be granted for any number of years not exceeding five as the Board may decide in each case. Rule 45 refers to the number of licences which may be granted for any local area but there is no reference of wholesale licences. Similarly, Rule 46 lays down the general principles for fixing the number of licences to be granted for the retail sale of liquor for consumption on the premises of the vendor. However, it appears that the statutory authorities under the Act as well as the Board of Revenue have proceeded on the assumption that the provisions of Chapter VI of the Act and those of Rules 44, 45 and 46 apply as much to the grant of licence for retail sale as for the grant of wholesale licence.

We find that there is no specific provision in the Act providing a procedure for the grant of wholesale licence to vend IMFL. Apparently, for the grant of wholesale licence to vend liquor, the same rules are followed as are prescribed for the grant of licence for retail sale. We also, therefore, proceed on the same assumption."

12. Thus, in our view, there is no force in the submission advanced on behalf of the petitioners that the wholesale licences for sale of IMFL can be granted or renewed for unlimited period if the conduct and management are found satisfactory in terms of Board''s Instruction No. 101(3).

13. The submission advanced on behalf of the petitioners that the direction issued by the Board in paragraph 7(2) of the order is invalid as the same was passed behind their back and the Board has no power to issue such instruction without the same being Gazetted u/s 92 of the Act is concerned, we do not find any force in the aforesaid submission. The Board has not issued any direction in paragraph 7 (2) of the order. The Board has only reproduced the statutory provisions including Rule 44 of the Rules and reminded the authorities about their misinterpretation of the provisions in granting and renewing the wholesale licences against the statutory provision. As stated above, Rule 44 of the Rules is itself clear and as such the Board has neither issued any direction for making rules nor issued any instruction in terms of Sections 90 and 91 of the Act. The said decision is only in the sense of reminder or clarification to the authorities to act according to the provisions of the Act and the Rules.

14. So far the point regarding legitimate expectation is concerned, that is also devoid of any substance. It is well settled that there is no legitimate expectation against the policy decision and statutory rules. In the result, there is no merit in this application and the same is dismissed.

S.N. Hussain, J.

I agree.

