

(2010) 10 CAL CK 0049
In the Calcutta High Court
Case No : Writ Petition 1548 (W) of 2007

Mr. Arindam Jha

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Bengal Excise Act, 1909 — Section 26, 3, 30, 31, 36

Constitution of India, 1950 — Article 226

West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain other Intoxicants) Rules, 2003 — Rule 16, 2, 216, 3, 8

Citation : (2010) 10 CAL CK 0049

Hon'ble Judges : Syamal Kanti Chakrabarti, J

Bench : Single Bench

Advocate : Pratap Chatterjee, Soumen Sen., Siddhartha Banerjee, Somnath Roy and Suchayan Banerjee, for the Appellant; Sutanu Kr. Patra, for the Respondent

Final Decision : Dismissed

Judgement

Syamal Kanti Chakrabarti, J.—The present writ petition has been filed challenging the legality and propriety of the order dated 25.07.2006 passed by the Sub Divisional Magistrate and Sub Divisional Officer, Malda whereby and whereunder the Bar of the writ petitioner under the name and style of "Barron" Bar-cum-Restaurant was temporarily closed following an explosion on 09.06.2006 within residential co-operative complex followed by final order passed by District Magistrate, Malda dated 16.08.2007 refusing to reopen the Bar at its existing site but liberty was given to the licensee to shift the same to some other safer zone, if he so desires.

2. It is contended by the writ petitioner that on 7th September, 2005 he was granted licence for retail sale of foreign liquor from his bar premises at Pranta Pally, Rathbari, under English Bazar, P.S. Malda till 31.03.2006. Respondent No. 3 called a meeting of all the licensees of Malda District in February, 2006 for renewal of their licences except the writ petitioner. Nevertheless, he deposited, necessary licence fee @ Rs. 20,000/- for renewal of his licence for 2006 - 2007

with the local treasury on 13.03.2006.

3. On the night of 09.06.2006 at about 2 A.M. there was an explosion causing immense damage to above premises as well as to a considerable portion of the duty paid liquor stock of the petitioner. At that time the Bar remained closed and there was no fault or negligence on the part of the petitioner for such accident. On 10th June, 2006 respondent No. 6 inspected the premises while the petitioner handed over all documents including Bar-Register, Godown Register, Inspection Report Book and the last - sold receipt book etc. to the Respondent No. 6. On receipt of necessary release order from local police authority on 16.06.2006 he renovated damaged bar premises by 26.06.2006 at huge expenses. Thereafter on 27.06.2006 he made a written request to Respondent No. 8 to handover all documents received from him on 10.06.2006 by the respondent No. 6 so that he could reopen his business followed by subsequent reminders on 29.06.2006, 30.06.2006 and 17.07.2006 but to no effect. On the 19th July, 2006 he wrote a letter to respondent No. 3 with a request to direct Excise Deptt. to certify newly purchased documents like Bar Register, Godown Register etc. so that he could reopen his business for which he was incurring daily financial liability of Rs. 1500/- against bank loan taken for running his business. Thereafter Respondent No. 7 visited his Bar and submitted an inspection report on the basis of which Respondent No. 4 issued an order dated 25.07.2006 directing the petitioner to close his business temporarily which is now assailed. In his supplementary affidavit filed 23.04.2007 he has further prayed for quashing this order dated 08.02.2007 and 16.03.2007 passed by Dy. Commissioner of Excise (Hqrs), W.B. and the District Magistrate, Malda respectively refusing to allow him to reopen his Bar at existing site with liberty to shift the same to another restriction free site, if he so desires.

4. In their affidavit-in-opposition the respondent No. 1-8 have claimed inter alia [para No. 4(f)] that the foreign liquor bar licence granted in favour of the petitioner temporarily cannot be allowed to continue since he is not entitled to run the same at the site situated on the first floor of residential complex namely Rituraj Apartments. As per Rule 3(xii) of notification 800-ex. of the Government of West Bengal, Department of Excise dated 29.07.2003 the term "site" means any place in a local area preferably in a market place, commercial centre or business area. The petitioner's Bar-cum-Restaurant is situated on the First Floor of the said building while the second and third floors are used for residential purposes. Moreover, after the aforesaid explosion the local residents of the apartment raised objection and prayed for closure of the said Bar-cum-Restaurant within residential area. It is also submitted that in the entire district of Malda there are 11 Bar-cum-Restaurant of which only petitioner's liquor shop situates in a residential complex. Therefore, instead of cancellation of his licence he was given option to select a free alternative site for grant of licence to carry out business which is neither violative of any fundamental right nor opposed to the principle of natural justice. In the opinion of the District administration they are not in a position to allow Bar-cum-Restaurant to continue without ensuring

the safety of lives and property of the local residents of the apartment within which the petitioner herein intends to continue his business. Therefore, there is no merit in this writ petition which is liable to be dismissed with costs.

5. Under the aforesaid circumstances the points for my consideration are: (a) Whether the respondent authorities are justified in closing temporarily the liquor shop business of the writ petitioner? (b) Whether the writ petitioner has acquired any right to continue his business of liquor shop at a residential complex by claiming any fundamental right? (c) Whether petitioner can claim any right to continue his liquor shop business at existing site in view of explanation to Rule 3(iii) and Rule 8 of the West Bengal Excise (selection of New Sites and Grant of License for Retail Sale of Liquor and Certain other Intoxicants) Rules, 2003? (d) Whether there is any illegality or impropriety in the impugned orders of the respondents directing the petitioner herein to select an objection free alternative site which requires judicial interference.

6. It is admitted fact that the petitioner herein was granted licence to run liquor shop within the residential area for a particular period up to 31st March, 2006. It is also admitted fact that there was an explosion in the business place on 9th June, 2006 at 2 A.M. causing immense damage to the premises and considerable portion of the duty paid liquor shop of the petitioner (para - 11). It is also admitted by the petitioner herein that respondent No. 3 called a meeting of all the licensees of Malda Districts in February, 2006 for renewal of the licences except the writ petitioner. From such admission it is clear that before renewal of all the liquor shop of the district the district administration excluded the present petitioner from their zone of consideration because only he was running such business within residential complex and near a school. Nevertheless on 13.03.2006 he deposited necessary licence fee of Rs. 20,000/- for renewal of his licence for 2006-2007 with the local treasury. But his licence was not renewed after 31.03.2006. Nevertheless merely by depositing or tendering of licence fee he continued his business illegally without obtaining any permission of the competent authority.

7. In para 11 of the writ petition he has admitted that Bar-cum-Restaurant for selling foreign liquor was running till 8th June, 2006 and after closure of his business for the day 8th June, 2006 the accident occurred. Therefore, this conduct of the writ petitioner for running the business of foreign liquor shop within residential premises after expiry of the tenure of his licence on 31.03.2006 is not legally tenable and no right can be claimed after expiry of the tenure of such licence merely by tendering the licence fee. Therefore, the present petitioner tendered the licence fee for 2006-2007 at his own risk and/or responsibilities and continued to run his business without valid licences from 01.04.2006 till the date of explosion on 08.06.2006 at his own peril.

8. In the case of *Bansibadan Saha v. State of West Bengal* 1997 (1) CHN 356 it has been held by this Hon'ble Court that the right to deal any liquors is not a fundamental right but is merely a privilege. Such a privilege is controlled by the

provisions of the Bengal Excise Act, 1909. While passing an order on account of renewal of licence, the licencing authority is not only to take into consideration the factors relating to revenue, but also may have to take into consideration the interest and/or facility of the consumers. Licences are granted or renewed only in terms of the provisions of the said Act. Sub Section (2) of Section 8 of the Bengal Excise Act, 1909 states that the orders passed under said Act or any Rule made thereunder, shall be appealable. Sub Section (3) of Section 8 empowers the State Government to refuse any order passed by the Collector or the Excise Commissioner or the Commissioner of a Division or by an officer exercising appellate power. The said Act is a self-contained code, and in that view of the matter when there is a disputed question of fact ... does not fit case where the Hon"ble Court should exercise its jurisdiction under Article 226 of the Constitution of India without having the opinion of the statutory authorities before it.

9. Keeping in view the above principles if the facts and surrounding circumstances of the present case are examined it will appear that initially the District administration allowed the writ petitioner to continue his business of foreign liquor shop within a residential complex for a fixed period. After the explosion of 8th June, 2006 they called for a report from the local police authority. From the report dated 21.10.2006 of English Bazar P.S. it transpires that on the requisition of I.O. concerned Dr. Susanta Mukherjee, Senior Scientific Officer, Physics Division. FSL, Kolkata visited and examined the place of occurrence and has offered his opinion in the form of a report to the effect that the said occurrence did take place due to sudden increase of pressure, and due to leak of LPG from pipe fitted with cylinder to oven and subsequently accumulated and ignited by refrigerator"s spark.

10. Referring to above the Learned Lawyer for the petitioner submits that it is merely an accident and not the outcome of any negligent conduct of the writ petitioner for which his permanent livelihood earned by such business will be suspended or shifted elsewhere. From the supplementary affidavit filed on behalf of the writ petitioner I find that the local residents submitted a joint petition to the Superintendent, Excise, West Bengal Excise Department, Malda requesting him to take steps for removal of Bar-cum-Restaurant from the residential apartment at Station Road, Rathbari, Malda after the incident of blasting on 09.06.2006. It also appears that the Sub-Divisional Magistrate, Malda in his memo No. 1096/SC dated 20.07.2006 requested Inspector-in-Charge, English Bazar P.S. to supply information on six points raised therein. The relevant question are quoted below:

Question No. (II): Whether there is any apprehension of such incident in future, if the Bar remains open?

Question No. (III): Whether life and property of the residents of the apartment (Rituraj) will be safe, if the Bar is allowed to continue?

Question No. (IV): Whether police authority has granted any sort of NOC in favour of the licensee of the Bar (Barron)?

Question No. (VI): Whether there is any chance of deterioration of "public peace" if the Bar continues to function?

11. In reply dated 21.07.2006 the I.C., English Bazar P.S. answered in the affirmative in respect in answer to question No. (II). In answer question No. (III) they submitted report to the effect the position is not fit for any Bar / Restaurant as the Bar is situated in a residential complex. His answer to question No. (IV) was in the negative. In answer to question No. (VI) their opinion is that the place is not suitable for Bar. After consideration of such report the Sub-Divisional Magistrate, Malda by order dated 25.07.2006 exercised his power u/s 26 of the Bengal Excise Act, 1909 and temporarily closed the Bar-cum-Restaurant to preserve public peace till completion of police investigation which was confirmed by subsequent order thereon by the District Magistrate and Collector, Malda after completion of such investigation. The District Magistrate and Collector Malda has, however, carefully considered the reports called for from all concerned and ultimately by order dated 16.03.2007 has held inter alia that if the Bar is allowed to function at its existing site the entire residential apartments will be a "Jatugriha" because in any case ethyl alcohol is a highly combustible article. In addition the drunken customer of the Bar loitering within the same complex may disturb the moral and ethical tranquility of the residents and their families residing at the same premises. Moreover, the question of "public peace" is intricately involved and if it is allowed to reopen at its existing site business, the lives and property of inhabitants of the residential apartment will be in danger or exposed to risks and the same will also affect moral ethos of a small town like Malda which may subsequently affect law and order situation. Therefore, he has decided not to reopen the Bar at its existing site and in his communication being No. 25-13(Misc)/05-06/4044A 08.02.2007 has communicated his decision rejecting the prayer of the writ petitioner to reopen the Bar at the existing site but in the same breathing he was informed that the licence site may be shifted to another restriction free site, if the licensee so desires.

12. Learned Lawyer for the writ petitioner has submitted that the decision of the collector was taken exparte without giving reasonable opportunity of being heard to the petitioner and from this point of view the decision is opposed to the principle of natural justice and not sustainable in law. From the day to day affairs of the proceedings recorded in the order sheet in connection with Misc. Case No. 3 of 2007 it appears from Order No. 1 on 07.03.2007 that the District Magistrate and Collector, Malda issued notice to the writ petitioner directing him to appear before him on 12.03.2007 at 2.30 P.M. at the office chamber of the District Magistrate, Malda for hearing either personally or through authorised person with relevant papers and documents in the matter. From order No. 3 dated 12.03.2007 I find that Learned Advocate Sri Siddhartha Banerjee appeared for the petitioner with an authorization letter and on that date the District Magistrate

and Collector heard all the parties present namely Learned Advocate for the petitioner, Superintendent of Excise, Malda and Sub-Divisional Officer, Sadar. On that date Learned Advocate for the petitioner was requested to submit written argument by 15th March, 2007. After careful consideration of all circumstances the District Magistrate and Collector, Malda passed order No. 4 dated 16.03.2007 and decided not to reopen the Bar at its existing site but if the licensee desires, the scope of shifting the same in terms of extant excise rules, remains open. Such a findings cannot be said to be arbitrary or violative of the principle of natural justice since both the parties got ample opportunities to make their submission and the decision making authority has come to the conclusion after applying his mind. While the administrative action has been taken after due notice to all concerned the same cannot be interfered with in writ jurisdiction on account of financial hardships or any hyper technical lapses on the part of the administration. Considering all these facts and surrounding circumstances I hold that there is no illegality or impropriety in the impugned administrative action of the District authorities which requires interference by the writ court particularly while the writ petitioner was carrying on his business of foreign liquor after expiry of the period of licence on 31.03.2006 at his own risk and responsibility which ultimately became fatal on 08.06.2006 by sudden explosion which may be termed as accidental but which may occur at any time endangering the safety and security of the lives and properties of the residents of the apartment. So it is unwise to accept the permission to run such business for a limited period to be a valid fundamental right accrued in favour of the petitioner to continue his business at same site after 31.03.2006. Subsequent decision of the administrative authority to shift the venue of the business for public safety to a safer zone to avoid similar accident in future can never be treated as arbitrary or violative of the principles of natural justice, rather it is outcome of administrative decision directed to secure public interest which does not call for any judicial review.

13. Learned Lawyer for the petitioner has drawn my attention to the provisions of Rule 8 and explanation to the definition of "existing site" in Grant of License for Retail sale of liquor and Certain other Intoxicant) Rules, 2003 and contended that under explanation to Section 3(iii) of the said Rules "existing site" shall continue to remain an existing site even if retail sale of liquor or any other intoxicants the existing site specified in Rule 2 under a license is stopped or closed or the license is cancelled or suspended or withdrawn or surrendered or even when the license lapses on the death of persons to whom with or without others, it was granted. He has further contended that Rule 8 thereof imposes restrictions on grant of new license at certain new sites which provision is inapplicable in the present case of renewing license for existing site which will come under the purview of explanation to Rule 3(iii) cited above. Learned Lawyer for the state has contradicted him and drawn my attention to proviso to Rule 16 thereof which runs as quoted below:

Rule 16. Shifting of an existing license shop at a new site: (1)....

Provided that no non-refundable application fee shall be payable for shifting within the same excise district if the collector is satisfied that the shifting of an existing licensed shop is necessary in the interest of the people residing in the area or that such change or shifting is due to change of existing rules or procedures beyond the control of the licensee or the proposed new site is within the same ward or Gram Panhayat in the district.

14. While considering such rival contentions I hold that much emphasis was given upon the words "in the interest of the people" used in such proviso to Rule 16. This obviously empowers the licensing authority to take any decision for shifting of existing license shop at a new site in the interest of the public. In the instant case interest of public is endangered for recurring of similar explosion which is admittedly beyond human control and for affecting moral and ethical tranquility of the local residents if the drunken customer loiters within the residential complex which cannot ordinarily be controlled and for existence of a common corridor-cum-balcony on the commercial block of Rituraj Building with common staircase referred to in the report dated 29.10.2003 of the Deputy Excise Collector, Sadar Range, Malda addressed to the Collector of Excise, Malda (Annexure "R-1 to A.O.)

15. I also find that said Rule of 2003 was framed by the Governor in exercise of the powers conferred by Section 85 and 86 read with Section 30, 31, 36, 37 and 37A of the Bengal Excise Act, 1909 Section 31 of the Act runs as follows:

Section 31. Grant of Licenses at existing sites -- Unless the State Government or the Excise Commissioner otherwise directs, the collector may, on the expiry of this period of validity of licenses for the retail sale of spirit at the existing sites, grant licenses for the retail sale of spirit at the existing sites, or if necessary, in the vicinity thereof for the next period of settlement in such manner and subject to such condition as may be prescribed.

16. In considering above provision I find that the Licensing Authority in the instant case exercised statutory discretionary powers conferred u/s 31 of the Act which has overriding effect upon Rule 3(iii) and explanation thereunder of the Rule of 2003. A combined reading of Section 31 of the Act with Rule 3(iii) 216 of the Rules of 2003 will lead to one irresistible conclusion that Licensing Authority contemplated under the Act and Rules framed thereunder was conferred with enough statutory discretionary power upon it to take a decision for shifting of existing liquor shop to some other safer zone for interest of the people residing in the area. I also hold that provisions of the said Rules of 2003 cannot be interpreted in total disregard of the specific provisions of Section 31 of this Act for implementation of which Rule is framed.

17. All the points raised are thus decided and I hold that there is no merit in this writ petition which is accordingly dismissed.

18. Urgent photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.