(1971) 04 PAT CK 0006

In the Patna High Court

Case No : C.W.J.C. No. 856 of 1969

M/s. Richpal Birmadutta and Others APPELLANT

Vs

The State of Bihar and Others RESPONDENT

Date of Decision : 21-04-1971

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 19(6), 226, 304
Essential Commodities Act, 1955 — Section 3, 5

Citation : (1971) PLJR 420

Hon'ble Judges : S. Sarwar Ali, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : B.P. Rajgarhia, S.K. Sharan, B.P. Gupta in C.W.J.C. 856/69, Hari Lal Agarwal and G.C. Bharuka in C.W.J.C. 146/70, for the Appellant; Shreenath Singh, for the Respondent

Judgement

N.L. Untwalia, J.—These two writ applications have been heard together as common questions of fact and law are involved in them and both are being disposed of by a common judgment. In C.W.J.C. 856 of 1969 there are 11 petitioners, out of whom petitioner no. 11, the Jamshedpur Chamber of Commerce, seems to be an unnecessary party. The three respondents are (1) the State of Bihar, (2) the Deputy Commissioner, Singhbhum, Chaibassa and (3) the District Supply Officer, Singhbhum, Chaibassa. The petitioners have obtained a rule from this Court under Article 226 of the Constitution of India against the respondents to show cause why Clause 6 of the Bihar Foodgrains Dealers'' Licensing Order, 1967 made u/s 3 read with Section 5 of the Essential Commodities Act, 1955 (Central Act 10 of 1955), hereinafter called the Licensing Order, be not declared ultra vires and why a writ in the nature of certiorari should not issue to call up and quash the order dated 19.6.69 passed by the Deputy Commissioner, Singhbhum, respondent 2, a copy of which is Annexure 4, as also the circular of the State Government contained in Annexure 5 along with the covering letter (Annexure 6) and the letter (Annexure 7) written to some of the petitioners. Cause has been shown by filing a counter-affidavit on behalf of respondent 2. Learned Standing Counsel I appeared at the time of the hearing of the application.

2. Petitioners 1 to 10 are wholesale dealers in foodgrains who had valid licences granted or renewed under the Licensing Order upto the year 1968. In December of that year they applied for renewal of their licences for the year 1969. Upon this, a letter dated 14.1.69 was written to petitioner no. 10 by the Deputy Commissioner, a copy of which is Annexure 1 to the writ application, to produce the up to date Income Tax and Sales Tax payment certificates and the assets of its property duly verified by the Income Tax authorities within a week from the receipt of the said notice, failing which adverse inference on these points would be drawn. According to the petitioners'' case, they approached the Income Tax Department for the said purpose, but in spite of their best efforts they were not able to obtain the required certificates. The Deputy Commissioner then wrote a letter to the petitioners on 1.7.69, a copy of which letter written to petitioner no. 10 is Annexure 2 to the writ application. He directed the petitioners to file the payment certificates of the Sales Tax and the Income Tax Departments, but, as it appears from this letter, certificates in regard to the property were not insisted upon. Some of the petitioners were able to comply with some of the requirements--some were able to comply with all. But at the time the impugned order was made they had not done so, and renewal of the licence, in case of some, was postponed and in case of some it was refused, as would appear from the certified copy of the report made by the District Supply Officer, respondent 3, to the Deputy Commissioner, respondent 2 (Annexure 4), upon which the latter passed the orders on the margin of the report. In some cases time was granted and in the case of petitioner no. 1, to connect his serials 5 to 8 in Annexure 3, the chart prepared by the office of the District Supply Officer, the reason found mentioned by the Deputy Commissioner in his order dated 19.6.69 is as follows:

Show cause perused. In view of the circular of the F.D. (No. 2128F dated 10.9.49) we may not issue the licences. An investment of less (than) Rs. 10,000/- admitted by the applicant does not appear to be sufficient to carry on wholesale business.

This refusal to renew the licence was in exercise of the power under Clause 6 of the Licensing Order. Of course, the petitioners could go in appeal under Clause 9 to the Commissioner but in this case they did not go and came straight to this Court. Their application was admitted and the stay of the impugned order was granted.

3. In the counter affidavit it is mentioned in Paragraph 6 that subsequently licences of petitioners 2, 4 and 9 have been renewed and those of petitioners 3, 6, 7 and 8 were under consideration. The ground on which the licences of petitioners 1 and 5 are said to have been refused to be renewed is that petitioner no. 1 had not furnished its Sales Tax clearance certificate and stated that it was not an assessee under the Income Tax Act. Regarding petitioner no. 5 it is mentioned in Clause (v) of Paragraph 6 that it filed Sales Tax clearance certificate

and expressed its inability to produce the Income Tax clearance certificate on the ground that it was its new business, but this explanation was not accepted as satisfactory by the licensing authority. In regard to petitioner no. 10, it is not clear as to why its case has not been disposed of one way or the other. In Paragraph 7 of the counter-affidavit, the order of the Deputy Commissioner is sought to be sustained on the ground that under Clause 2(d) of the Licensing Order one who deals in foodgrains of more than 100 quintals at a time, as defined therein, is expected to invest more than Rs. 10,000/- as the minimum value of 100 quintals would be Rs. 10,000/-. He is, therefore, to be assessed to Sales Tax and Income Tax. He who invests more than Rs. 10,000/- in trade should invariably be an income tax assessee. Failure on the part of the dealers to produce Income Tax and Sales Tax clearance certificates tends to confirm the belief that they are either tax evaders or are not financially sound to run the wholesale business.

4. The facts of C.W.J.C. 146 of 1970 are like this. The petitioner firm had a valid licence granted or renewed upto the year 1968. It applied for renewal of the licence for the year 1969 in December, 1968. On 14.1.69 same kind of letter, as is Annexure 1 in the other case and Annexure 1 here, was written to it also. The petitioner says that it is not an assessee under the Income Tax Act or the Sales Tax Act and it merely holds a registration certificate under the Bihar Sales Tax Act Another notice was issued to it on 3.3.69, a copy of which is Annexure 2, to show cause why the renewal of its licence be not refused. It challenges the order on the ground that it was not given any opportunity to be heard by the licensing authority. But it went up in appeal before the Commissioner of Chotanagpur Division, who is respondent no 2 in this case, respondent no. 1 being the State of Bihar and respondent no. 3 being the Deputy Commissioner, Singhbhum, Chaibassa, under Clause 9 of the Licensing Order. Its appeal was dismissed on 15.12.69, relying upon the office letter no. 21285/F dated 10.9.49 and for the reasons given in another appeal. Copies of the orders of the Commissioner are Annexures 4 and 4/1. In this case also, the petitioner challenges the orders refusing to renew its licence as being ultra vires, illegal and void and has prayed to the Court to set aside the orders contained in Annexures 3 and 4 as also to direct the authorities to renew the petitioner''s licence for the subsequent periods.

5. The question on the arguments advanced by learned counsel for the petitioners and learned Standing Counsel I for the respondents brings out the following points for our decision--

(i) Whether Clause 6 of the Licensing Order is ultra vires being violative of Article 14 or 19(1)(g) of the Constitution.

(ii) Whether the requirement by the licensing authorities of production of Sales Tax certificate, Income Tax certificate or property certificate was vaild and can be sustained in law.

(iii) Whether the licensing authorities could refuse to renew the licences on the basis of the circular of the Finance Department dated 10.9.49 or whether that circular was valid or whether they could refuse to renew the licences of the petitioners in both the cases on other grounds, as has been done in these cases.

(iv) Whether C.W.J.C. 856 of 1969 can be entertained when the petitioners had not availed of the alternative remedy provided under Clause 9.

6. The Licensing Order was made by the Governor of Bihar for the purpose of regulating trade in foodgrains in the State of Bihar. Clause 3 puts a restriction on the fundamental right of a person to carry on a trade under Article 19(1)(g) of the Constitution, which restriction repeatedly has been held to be a reasonable restriction, in the interest of the general public. In face of the said reasonable restriction put in Clause 3, no person can carry on business as a wholesale dealer or retail dealer except under and in accordance with the terms and conditions of a licence issued in this behalf by the licensing authority. Clause 6 says that--

The licensing authority may, after giving the wholesale or retail dealer concerned an opportunity of stating his case and for reasons to be recorded in writing, refuse to grant or renew a licence.

Clause 7 says that for contravention of conditions of the licence, the licence may be cancelled or suspended and when there has been a conviction in respect of contravention of any order made u/s 3 of Central Act 10 of 1955 the licence may be cancelled under Clause 8. Clause 9 provides for an appeal to the Commissioner from the order of the District Magistrate or Deputy Commissioner in the matter of refusal, suspension or cancellation of licence. It would thus be noticed that the power to refuse to grant or renew a licence conferred on the licensing authority is in a very wide language. If it is allowed to remain as wide as it purports to be then the only restriction on the exercise of that power is that the reason has to be recorded while refusing to grant or renew a licence. But no guideline has been provided as to on what grounds and for what reasons such a refusal can be made. Such an unbridled and uncontrolled power without any guideline can be held to be violative of Article 14 as the power may be described in a discriminatory manner in case of some or may be held to be an unreasonable restriction in regard to procedural restriction put under Article 19(6) of the Constitution. But then it is a well settled principle of law that instead of reading such a wide power in such a clause like Clause 6 and making it violative of certain Articles of the Constitution, it is permissible to limit and cut down the exercise of the power for reasons which may be germane to the object of the controlled legislation and may have a probative relation or nexus with the purpose of such legislation. The requirement of recording reasons clearly shows that the licensing authority cannot, for any arbitrary or whimsical reason not connected with the object and provisions of the controlling legislation, refuse to grant or renew a licence. That being so, giving that limited meaning to Clause 6, it has got to be held that it is not ultra vires or violative of Articles 14 and 19(1)(g) of the Constitution.

7. There is no provision in Central Act 10 of 1955 or in the Licensing Order which can indicate that the licensing authority before granting or refusing licence can ask for or insist upon production of a clearance certificate from the Income Tax Department or the Sales Tax Department. Such a provision has not been made either in the Act or in the Licensing Order. If and when such a provision is made, it may be a matter of debate as to whether such a provision is valid and can be upheld with reference to certain provisions of the Constitution. But that question does not fall for our decision. Suffice it to say that under the Licensing Order the licensing authority has no power to insist for the production of a clearance certificate from the Income Tax Department or the Sales Tax Department or to produce a certificate of valuation of property. The licensing authority is concerned with the question of carrying on the business in accordance with the Licensing Order and whether a person for the purpose of the Licensing Order is a fit person to be granted a licence. The said authority cannot act as an agent of the taxing department, be it the Central or State, in the garb of exercise of its power under Clause 6 to see that the licence will not be granted or renewed if clearance certificates of the taxing departments are not produced. It was said by a Bench of this Court, of which I was a member, in (1) Working Secretary, Bihar Transport Association V. State of Bihar (1969 B.L.J.R. 442) that a similar provision introduced in the Bihar and Orissa Motor Vehicles Taxation Act, 1930 (Act 2 of 1930) for the purpose of collection of tax under Bihar Act 17 of 1961 was really a provision providing for an additional mode of collection of tax due or assessed under Bihar Act 17 of 1961. In that case, however, the reasonableness of such a restriction was not tested as the Ordinance introducing such a provision was struck down as being violative of the proviso to Clause (b) of Article 304 of the Constitution.

8. Coming to point no. 3, it has to be pointed out that by executive instruction the law engrafted in Central Act 10 of 1955 or the Licensing Order cannot be amended. A copy of the circular of the Finance Department dated 10.9.49 is Annexure 5 in C.W.J.C. 856 of 1959. Apart from the fact that this circular was issued several years prior to coming into force of the Essential Commodities Act, 1955 or the Licensing Order, I am definitely of the opinion that no condition could be laid down by the executive instruction for the grant or renewal of the licence, which could not be supported with reference to the Act or the Licensing Order. This circular starts with the phrase--

resolved that financial patronage and favour at the disposal of the provincial Government should be granted only to honest tax payers and genuine new comers, and persons who have been found to be evading payment of either central or provincial taxes shall be denied such patronage.

Then in Clause 3 of the circular it is stated--

Contracts, permits, licences, etc., of more than Rs. 10,000/- should not ordinarily be given to person who have not been paying income tax and sales tax except with the approval of the head of the department or the provincial Government and for reasons to be recorded in writing.

Giving of contracts may be on different footing. Granting permits may not be, to be exact, on a footing different from the grant of licence. Yet it may have different ramification for consideration at the time of grant of permit. But surely the expression "licences.......of more than Rs. 10,000/-" will have no meaning when read with grant of licence under the Licensing Order. The licence is granted for carrying on the foodgrain business--either wholesale or retail. There is no value of the business fixed at the time of the grant of licence. The interpretation put in the counter-affidavit that the wholesale dealer is required to invest at least Rs. 10,000/- is not correct. Under Sub-clause (d) of Clause 2 a wholesale dealer is permitted to store at one time more than 100 quintals of foodgrain. The value of 100 quintals of foodgrain may be Rs. 10,000/-. But that does not mean that the dealer must have a capital of his own to the extent of Rs. 10,000/- to enable him to obtain a licence under the Licensing Order.

9. It is not uncommon to find that even by large investment a person may not be able to earn such income as may be subjected to payment of income tax. The payment of sales tax depends upon taxable turn over. Even assuming that the licensing authority had suspicion in his mind that persons like petitioners who wanted wholesale dealer''s licence could not but have earned income on which income tax could be charged, it was not for him to come to a conclusion that the irresistible conclusion was that they were evading payment of income tax or sales tax and, therefore, they were not fit persons whose licences should be renewed. The matter should be left to the care of the respective taxing departments unless, of course, a duty is enjoined by incorporating a provision in the Act or in the Licensing Order (subject to its vires being tested in the court of law) on the licensing authority to see that persons who are not able to satisfy that they are income tax assessee or produce income tax or sales tax clearance certificate should not be granted licence.

10. In support of the argument, learned counsel for the petitioner in C.W.J.C. 146 of 1970 placed reliance upon 3 cases. Two are Bench decisions of the Madhya Pradesh High Court and the Allahabad High Court, and the third is a decision of Subba Rao, J., as he then was, sitting singly as a Judge of the Madras High Court. I shall first take up the decision of the Madras High Court. The decision is in (2) K. Raman and Co., Tellicherry Vs. The State of Madras and Another, . Almost under similar circumstances licence was refused for non-production of a clearance certificate of the Income Tax Department. The learned Judge observed in Paragraph 4 of the judgment--

The petitioner is a citizen of India and has the fundamental right to carry on the trade which he has been doing. The State can only put a reasonable restriction upon his right in the interest of general public. But, in this case, the order of the Collector discloses that he is using his powers under the Yarn Dealers'' Control Order for the purpose of collecting the amounts due to the Government of India. The fact that a person is in arrears of income tax is not germane to the issue of a licence under the Yarn Dealers'' Control Order. It is a circumstance extraneous to the petitioner''s right to carry on his business. The Income Tax Act provides an adequate machinery for realising the arrears due from an assessee. I am of the view that the restriction imposed is unreasonable and is not in the interests of the general public.

In (3) Mohammad Sulaiman V. Regional Food Controller (1955 A.L.J. 505) Chaturvedi, J., delivering the judgment on behalf of the Bench said that the renewal of a licence under the U.P. Flour, Rice and Dal Mills Control Order, 1951 cannot be refused on the ground that the working of the Flour Mills is causing nuisance to the hospital situated near the Mills. The reason given in support of this view was that neither the Control Order nor the Essential Supplies Act was in any way concerned with the questions of nuisance or inconvenience caused to the persons who were residing in the vicinity of the Mills, which according to the Control Order, could only be run under a licence issued under it. This case supports the view that the grant or renewal of a licence cannot be refused for a reason which is wholly unconnected with the Essential Commodities Act or the Licensing Order. In (4) Phoolchand Narendra Kumar and Others Vs. State of Madhya Pradesh and Others, A.P. Sen, J., delivering the judgment on behalf of the Bench said in Paragraph 6 at Page 73 (column 1)--

The provisions of the Order nowhere furnish the grounds upon which the licensing authority can refuse to grant a licence or its renewal. They must, however, be interpreted in the light of the considerations arising from Article 19(1)(g), read with Article 19(6) of the Constitution of India, as otherwise, Clause 3 which provides for the licensing of dealers would confer unguided discretion to the Collector in the matter of grant or refusal of licences and their renewal. The grant of a licence or its renewal under the Order should be the normal rule as it is undoubtedly a restraint on the freedom of trade which is guaranteed to any citizen under Article 19(1)(g) of the Constitution. We are therefore, of the view that Clause 3 of the Order does not confer an absolute discretion on the Collector to grant or revoke a licence just as he pleases. The power has to be exercised in a reasonable manner, keeping in view all the considerations that are relevant.

It appears their Lordships of the Madhya Pradesh High Court were concerned with Clause 3 of the Control Order under which a licence had to be taken and it is for that reason that they went to test the reasonableness of the order in question. The licensing authority had refused to renew the licence on the ground that some of the partners of the applicant firm were common in a firm which already held a separate licence and, therefore, this firm was refused renewal of the licence. The Madhya Pradesh High Court held that it was not a reasonable restriction and, therefore, the order could not be supported. I may here point out that I do not rest my judgment on the reasonableness of the requirement and do not base it on Article 19(6) Such a test will have to be applied if a provision will be made in the Essential Commodities Act or in the Licensing Order, which would justify the action of the licensing authority in refusing to grant or renew a licence for non-production of Income Tax or Sales Tax certificates. But here I want to emphasis that the order as it is, even assuming that the restriction so put may be reasonable, cannot be supported with reference to the provision of the Act. But I respectfully agree with the view in that decision expressed at page 74 (column 1) that the reason must necessarily have nexus to the main object and purpose of the legislation, i.e., control of production, supply and distribution of trade and commerce in certain commodities which are essential to the life of the community in general.

11. Learned Standing Counsel endeavored to support the impugned orders in the two cases by stating that the orders are not necessarily based upon the circular of the Finance Department issued in the year 1949 and the requirement of the licensing authority cannot be held to be unreasonable. I find no force in this argument, as reading the impugned orders it would be noticed that they are mostly based upon the circular of the Finance Department and upon the suspicion that a person investing more than Rs. 10,000/- in foodgrains must be earning income which could be subjected to payment of income tax. These are not germane to the object of the Licensing Order and have no nexus with it. The order of the appellate authority, namely, the Commissioner, Chotanagpur Division, which is Annexure 4 as well as Annexure 4(i) in C.W.J.C. 146 of 1970 would clearly indicate that the Commissioner upheld the order refusing to renew the licence on these two grounds. In my opinion, the order is so obviously wrong and the restriction put by the licensing authority is so obviously foreign to the object of the Licensing Order, as it stands today, that I find no justification in dismissing C.W.J.C. 856 of 1969 on the ground of an alternative remedy being there. I may usefully add that the appellate authority who dismissed the appeal in C.W.J.C. 146 of 1970 would have been the appellate authority in the other case and he must have taken the same erroneous view which he has taken in one case. According to the counter-affidavit the licences of petitioners 2, 4 and 9 in C.W.J.C. 856 of 1969 have already been renewed. Therefore, in their cases it is not necessary to give any specific direction except to observe that in future the renewal of their licence should not be refused on the ground it has been done in the impugned orders. Cases of petitioners 1, 3, 5, 6, 7, 8, and 10 are fit to be allowed. The impugned orders, copies of which are Annexures 4 and 7, are quashed by grant of a writ of certiorari. The licensing authority, by a writ of mandamus, is directed to renew the licences of those petitioners if otherwise they or any of them, for any other valid reason, are or is not fit to be renewed. Clause 6 of the Licensing Order, for the reasons stated above, cannot be declared ultra vires nor is it necessary to quash the circular of the Finance Department (Annexure 5). The prayer of the sole petitioner in C.W.J.C. 146 of 1970 is allowed. The order of the licensing authority contained in Annexure 3 as upheld in Annexure 4 on the basis of the reasons mentioned in Annexure 4(i) is quashed by grant of a writ of certiorari. The licensing authority is directed, by a writ of mandamus, to renew the licence of the petitioner for the year 1969 if otherwise

for any other valid reason it is not fit to be renewed. Since orders in respect of the subsequent years are not before us, I do not propose to make any effective or operative order in regard to the subsequent years except to observe that renewal of the licence for the subsequent years should not be refused on the illegal and void grounds as has been done for the year 1969. I shall make no order as to cost in either of the Cases.

S. Sarwar Ali, J.

I agree.

