
(2003) 08 GAU CK 0033
In the Gauhati High Court
Case No : Writ Petition (C) No. 2820 of 2002

Mukul Kr. Hazarika

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 11-08-2003

Acts Referred:

Assam Sugar Dealer Licensing Act — Section 3, 5
Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 39 Rule 1, Order 39 Rule 2, 141
Constitution of India, 1950 — Article 14, 19, 21, 22, 226

Citation : (2003) 3 GLT 675

Hon'ble Judges : A.H. Saikia, J

Bench : Single Bench

Advocate : B.C. Das, D. Sur, S. Roy, Imilemtet and S.S. Choudhury, for the Appellant; A. Thakur, M.K. Choudhury, H.N. Sarma and R. Sarma, for the Respondent

Final Decision : Allowed

Judgement

A.H. Saikia, J.—Heard Mr. B.C. Das, learned Counsel appearing for the Petitioner. Also heard Mr. H.N. Sarma, learned Sr. counsel assisted by Mr. R. Sarma, learned Counsel for the newly impleaded Respondent No. 4 and Mr. M.K. Choudhury, learned Standing counsel appearing for the Respondent No. 3.

2. The legality and correctness of the impugned order dated 27.9.2001 passed by the learned Sub-Divisional Magistrate, Kamrup is the subject matter of adjudication in this writ proceeding.

3. The facts, in a nutshell, as has been emerged from the rival pleadings of the parties, are that the Respondent No. 4, the sole proprietor of M/S. Kamrup Gas Service was appointed as Distributor of L.P.G. by Respondent No. 3 and the Petitioner in order to make investment in the said business of distributorship of L.P.G. run by the Respondent No. 4 entered into an agreement on 4.11.95 with the Respondent No. 4. Though dealership was granted in the name of the

Respondent No. 4, the Petitioner having applied for, was also given the licence as required under the Assam Trade Articles (Licensing and Control) Order, 1982 (for short the order) in the name of M/S. Kamrup Gas Service with effect from 2.4.97 renewed upto 31.12.02 for carrying out the business. While the said business had been operated by the Petitioner as well as the Respondent No. 4 under the private understanding between them in terms of the agreement dated 4.11.95, the administrative authority i.e. the Sub-divisional Magistrate, Kamrup issued the impugned order (Annexure-5 to the writ petition) by which M/S. Kamrup Gas Agency (ought to have been named as M/S. Kamrup Gas Service) was directed not to proceed with any business of L.P.G. till the completion of the enquiry which was being conducted by the District Administration, Kamrup to look into the complaint of serious nature with a further direction to the Indian Oil Corporation (MD) to make alternative arrangement to the consumer. The impugned order is extracted as under:

Annexure-5

Dt.27.09.01

To M/S. Kamrup Gas Agency The Distributor, IOC (MD) Ulubari, Guwahati.

Sub: Regarding complain lodge by M/S. Star Moral holder of L.O.I.

I am to inform you that a complaint of serious nature has been lodged against you by the L.O.I. Holder.

And an enquiry is being conducted by the District Administration, Kamrup.

You are therefore directed not to proceed any business of L.P.G. as per declaration obtained from You till completion of the enquiry.

Further, Indian Oil Corporation (MD) Bamunimaidam, Guwahati is being intimated to make alternative arrangement for the consumers.

Sd/-Illegible S.D.M. Kamrup.

4. Before embarking upon the rival contentions and submissions of the learned Counsel for the parties, it would be apposite and necessary to refer the provisions of the law embodied in the Order, being relevant for the purpose of adjudication of this proceeding and those may be noticed as under:

5.(a) Order 3 provides that every dealer who carries on business of purchase, sale or storage for sale of any trade articles mentioned in the Schedule-I must act in accordance with the terms and conditions of licence issued by the Licensing Authority.

(b) The expression "Licencing Authority" has been defined under Order 2(n) which reads as follows:

Licencing Authority" means the Deputy Commissioners and Additional Deputy Commissioners in respect of Sadar Sub-Divisions and Sub-divisional Officer

(Civil) in respect of their Sub-Divisions and Director in respect of importers.

(c) Order 8 provides for power to refuse licence which runs as below:

Power to refuse licence. (1) The Licensing Authority may, after giving the person affected an opportunity of being heard, and for reasons to be recorded by him in writing refuse to grant or renew a licence.

(2) The Licensing Authority shall refuse to grant or renew a licence, if:

(a) the applicant is a minor or a lunatic or is of unsound mind; or

(b) the applicant is an undercharged insolvent; or

(c) three year period has not expired from the date of conviction of the applicant under the Essential Commodities Act, 1955 (Central Act 10 of 1955).

(3) The Licensing Authority (may) refuse to grant a licence for a particular trade article, if-

(a) a licence has already been issued to another dealer at the same place of business for the trade articles for which the applicant has applied for; or

(b) the applicant has applied for both wholesale and retail licence for the same trade article.

(d) Order 11 deals with suspension and cancellation of licence which prescribes as follows:

(1) If any licensee or his agent or servant or any other person acting on his behalf contravenes any of the terms and conditions of licence, then without prejudice to any other action that may be taken against him under the Essential Commodities Act, 1955 (Central Act 10 of 1955) his licence maybe cancelled or suspended with regard to one or more trade articles by any order in writing of the Licencing Authority and an entry will be made in his licence relating to such suspension or cancellation.

(2) No order of cancellation shall be made under this clause unless the licensee has been given a reasonable opportunity of stating his case against the proposed cancellation but during the pendency or in contemplation of proceedings of cancellation of licence, the licence can be suspended for a period not exceeding 90 days without giving any opportunity to the licensee of stating his case. Such suspension shall limited only to those trade articles regarding which contravention has been made by the licensee.

(e) Power of entry, search and seizure etc. has been contemplated under Order 30. It says:

(i) The Licensing Authority or any Executive Magistrate or Police Officer not below the rank of Deputy Superintendent of Police or any Officer of the Food and Civil Supplies Department not below the rank of Sub-Inspector or any other officer of

the Government not below the rank of an Inspector of the Food and Civil Supplies Department and authorized by the State Government in this behalf, within his jurisdiction, may, with a view to securing the compliance of this order or to satisfy himself that this order has been complied with, with such assistance, if any, as he thinks fit-

(a) require the owner, occupier or any other person in charge of any place, premises vehicle or vessel in which he has reason to believe that any contravention of the provisions of this Order has been or is being or is about to be made, to produce any books of accounts or documents showing transaction relating to such contravention;

(b) enter, inspect or break open and search any place or premises, vehicle or vessels in which he has reason to believe that any contravention of the provisions of this order has been, is being or is about to be made;

(c) seize any books of accounts and documents which is in his opinion may be useful for, or relevant to, any proceedings under the Essential Commodities Act, 1955 (Central Act 10 of 1955) and the person from whose such books of accounts or documents are seized shall be entitled to make copies thereof or to take extracts there from in the presence of an officer having the custody of such books of accounts or documents;

(d) search, seize and remove stocks of trade articles along with the packages covering or receptacles in which such stock is found if he has reason to believe that any provision of this order has been, or is being or is about to be contravened in respect of such stock or any part thereof and may also search, seize and remove the animals vehicles, vessels or other conveyances used in carrying the said trade articles in contravention of the provisions of this order and thereafter take or authorise the taking of all measures necessary for securing the production of Stocks of trade articles and the animals, vehicles; vessels or other conveyances so seized before the Deputy Commissioner and for their safe custody pending such production, and

(e) for the purpose of such inspection etc. ask any person all necessary questions....

6. A combined reading of the above provisions of law does indicate that the Licensing Authority has the power to refuse to grant or renew a licence if the applicant is a minor or lunatic or is of unsound mind or an undercharged insolvent and/or 3 years period has been expired from the date of conviction of the applicant under the Essential Commodities Act, 1955. The Licensing Authority is also empowered to refuse to grant licence if the licence has already been issued to another dealer at the place of business for the trade articles for which applicant has applied for or the applicant has applied both whole sale or retail licence for the same trade article. As per Order 11 the Licensing Authority has the power either to suspend or cancel the licence. But no such order of cancellation shall be made unless the licensee has been given reasonable

opportunity of hearing against the proposed cancellation of his licence and during such pendency of the proceedings of cancellation of licence, the authority has the power to put the licence under suspension and that too not exceeding 30 days without giving opportunity to the licence. So far the seizures of the articles are concerned, the Licencing authority or any Executive Magistrate or the police officers not below the rank of Deputy Superintendent of Police or any officer of Food and Civil Supplies Department not below the rank of Inspector of Food and Civil Supplies department shall have the power to enter and inspite any place of trade and to seize or search any stock of the trade articles if the said officer has the reason to believe that any provision of this order has been contravened. Thus it is expressly seen that no provision has been incorporated in the Order entrusting the Sub-Divisional Magistrate to issue an order to any person involved in running a trade or business, directing him not to proceed with his trade or business as in the instant case.

7. In the backdrop of those provisions of law, now let us Consider the respective arguments advanced on behalf of the parties.

8. Challenging this impugned order, Mr. Das, learned Counsel for the Petitioner has force fully argued that the impugned order has been passed illegally and without jurisdiction by the learned Sub-Divisional Magistrate, Kamrup who has not been authorised under the law to issue such order. According to him, the Order does not provide for any such provisions of law to authorise to issue such direction of not to proceed with the business. It is contended that though the impugned order, on the face of it, did not seem to be an order of cancellation or suspension of licence but the same was virtually meant for withholding the trade of M/S. Kamrup Gas Service. In other words, it came as cancellation of the licence granted in favour of M/s. Kamrup Gas Service. The case of the Petitioner, as submitted by Mr. Das relying on the additional affidavit filed on behalf of the Petitioner, is that although the licence was due to expire on 31.12.02, the Petitioner has already applied for renewal of the said licence in the prescribed application form under Form No. "B" on 31.12.02 and till date, the same has not been renewed. Mr. Das has submitted that since the licence has not been renewed or cancelled notwithstanding the due application made to the authority within the valid period of the licence, the licence may be deemed to be renewed.

9. To support this submission, Mr. Das has relied on a decision of this Court reported in 1991 (1) GLR 205 (State of Assam v. Ajit Singh Bothra and Ors.) In that case this Court; dealing with Sections 3 and 5 of the Assam Sugar Dealer Licensing Order, 1982, ruled that when an application for renewal of licence was filed in time and no order of refusal to renew was passed by the authorities, a licensee was entitled to carry his business until any order is passed refusing to renew the licence in accordance with law. In view of this judicial authority, this Court does find enough force in the submission of the learned Counsel for the Petitioner and accordingly this Court is of the view that the validity of the licence which expired on 31.12.2002, is deemed to be in force till the order of refusal to

refere such licence is passed by the Licensing Authorities on the basis of the application dated 31.12.02 preferred by the Petitioner.

10. Next contention of Mr. Das is that the impugned order was passed in flagrant violation of the Petitioner's fundamental rights guaranteed under Article 14, 19 and 21 the Constitution of India by which the Petitioner's business was closed affecting the livelihood of the Petitioner who has invested a huge amount of money in the business in terms of the agreement dated. 4.11.1995 with the Respondent No. 4. Furthermore, importantly, this impugned order was also hit by the principles of natural justice inasmuch as no reasonable and adequate opportunity of hearing was ever given to the Petitioner prior to passing of the impugned order. In view of the above facts and circumstances, it is contended that the impugned order is liable to be interfered with and maybe set aside.

11. At this stage, on being asked, Mr. Thakur learned State counsel has fairly submitted that the officer concerned i.e. Sub-Divisional Magistrate who has issued the impugned order is not the Licensing Authority as defined under Order 2 (n). Nor has he been duly authorised to issue the impugned order. But, according to Mr. Thakur, the impugned order was not a final order of cancellation of licence inasmuch as the same was passed only to facilitate the completion of the enquiry conducted to look into the complaints received against the Petitioner. Be that as it may, it is explicitly clear from the perusal of the provisions of law as mentioned above that this officer is not competent to issue such order and on this count along the impugned order has no leg to stand.

12. Controverting the averments made by the writ Petitioner and also submissions advanced on behalf of the Petitioner. Mr. H.N. Sarma, learned Sr. Counsel, raising a preliminary objection, has strenuously argued that this writ petition is not maintainable on the facts that the Petitioner had earlier approached the Civil Court for redressal of the grievances exactly similar to those made in the writ petition and as such the writ Petitioner cannot be permitted to invoke the jurisdiction of the writ proceeding under Article 226 of the constitution. His case is that Petitioner initially moved the learned Civil Judge (Sr. Division No. 3), Kamrup at Guwahati through Title Suit No. 244/01 praying for a decree of declaration that the impugned order dated 27.9.01 is inoperative, illegal and void and not binding on the Plaintiff/Petitioner. Along with the said Title Suit, Petitioner had also made an application under Order 39 Rule 1 and 2 of the CPC Praying for temporary injunction the authority from acting upon the impugned order dated 27.9.01. The Respondent No. 4 contested the said suit by filing written statement therein along with the objection to the injunction petition. The said learned Civil Judge after hearing the learned Counsel for the parties at length refused the prayer for interim injunction by his order dated 11.10.01. Thereafter the Petitioner approached before the said learned Civil Judge with a prayer to withdraw the suit with a permission to file afresh if so advised. The learned Civil Judge again after hearing the parties, by order dated 10.3.02, permitted the Petitioner to withdraw the suit but without any liberty to

institute a fresh suit. It is submitted that once the Petitioner was allowed, to withdraw the suit without any liberty to institute a fresh suit, the Petitioner is debarred from approaching this Court for the same cause of action under Article 226 of the Constitution of India. According to him, applying the spirit of Order 23 Rule 1 CPC which provides for procedure of withdrawal , of suit, being a matter of public policy without the rigour of the principle of res-judicata, the Petitioner can not be permitted to agitate the same cause of action afresh before the writ court. To clinch his submission, Mr. Sarma has relied on the following precedents.

(1) Daryao and Others Vs. The State of U.P. and Others, and

(2) Ram Kishan and Others Vs. Secretary to Govt. State of Haryana, Co-operative Dept., Chandigarh and Others,

13. In Daryao's case (supra), the Apex Court dealing with the applicability of the principle of res-judicata in the writ proceeding, in paragraph 11 observed that rule of res-judicata, not merely a technical rule but being based on public policy, can be invoked against a petition under Article 32 of the Constitution being moved after rejection of the similar writ petitions by the High Court under Article 226 of the Constitution. In Ram Kishan's case (supra), the Punjab and Haryana High Court observed that the dismissal of a suit on withdrawal disentitled the Plaintiff to claim the same relief on the same ground in a writ petition on general principles of res-judicata and on the principles of Order 23, Rule 1 of Code of Civil Procedure.

14. Mr. Das, learned Counsel for the Petitioner, distinguishing those cited judgments, has submitted that those judicial decisions were pronounced prior to amendment of 141 CPC in 1976 by Amendment Act of 1976. The expression proceeding has been explicitly defined in Section 141 by inserting the Explanation wherein a proceeding under Article 226 of the Constitution has been excluded from all proceedings in any court of civil jurisdiction u/s 141, CPC Therefore in the writ proceeding, not being a civil proceeding, preferred after the dismissal of a suit, the application of res-judicata and the principles of Order 23, Rule 1, CPC does not come. Citing the Apex Court's decision in Puran Singh and others Vs. State of Punjab and others, particularly referring to paragraphs 7, 10 and 11 therein, Mr. Das has argued that under Article 226, the High Court exercises extra ordinary jurisdiction coming at to secure a very speedy and efficacious remedy to a person when his legal or Constitutional right is at stake and as such if all the technicalities provided in the CPC are to be applied in the exercise of writ jurisdiction, the very purpose and object is likely to be defeated, especially when the proceeding mentioned in Section 141 does not include a proceeding under Article 226.

15. It is further contended by the learned Counsel for the Petitioner that the right to file a petition under Article 226 is a constitutional right which could not be taken away merely due to "dismissal of title suit of similar nature on withdrawal of the same without liberty to file afresh. There can be no estoppel against the

constitution. Here the Petitioner's right to livelihood has been infringed by the impugned order. Reliance has also been made by Mr. Das on *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, paragraph 28).

16. This Court finds enough force in the submission of Mr. Das and accordingly, in the Court's opinion, since the writ proceeding has been excluded from the meaning of the proceeding u/s 141, Code of Civil Procedure, the right to seek constitutional remedy under Article 226 of the Constitution cannot be curtailed by application of provision of CPC especially Order 23 Rule 1. Besides, in the instant writ proceeding, the Petitioner has raised the question of infraction of his fundamental rights guaranteed under Articles 14, 19 and 21 of the Constitution of India. Therefore, having regard to the above cited cases, it can be safely said that the writ petition is maintainable. Ratio of the judicial authorities referred by Mr. H.N. Sarma, the learned Sr. counsel in my opinion, has no applicability to the facts and circumstances of the case in hand.

17. Advancing his next contention, Mr. Sarma, learned Counsel, has contended that though the Respondent No. 4 is the necessary party in the writ petition as she was already made party in the earlier T.S., the Petitioner has intentionally refrained from arraying her as one of the Respondents in this writ petition for which she has to approach this Court herself for impediment and accordingly this Court has permitted her to be impleaded as Respondent No. 4. Thus the Petitioner has not approached this Court with clean hand to seek equitable relief under Article 226 of the Constitution. According to him the Respondent No. 4 is the sole proprietor of M/s. Kamrup Gas Service and all necessary communications have been made by the authorities including IOC, Respondent No. 3, accepting her to be the sole proprietor. Such non-inclusion of the Respondent No. 4 in this writ proceeding may be treated as suppression of material facts.

18. In the instant case, the Petitioner has impugned the order dated 27.9.2001 by which the business of M/s. Kamrup Gas Service was discontinued and admittedly the distributorship of M/s. Kamrup Gas Service was given to Respondent No. 4 though the Petitioner entered into the business with her under the private understanding in terms of the agreement dated 4.11.95. Fact remains that the licence under the Order was issued in favour of M/s. Kamrup Gas Agency on an application filed by the Petitioner. Records do not reveal that any application for issuance of such licence as required under the Order was ever made by the Respondent No. 4. Nor has any objection been made by her against the issuance of the licence for showing the Petitioner as proprietor, before the Licensing Authority. That being so, this Court is of the view that arguments advanced by Mr. Sarma does not hold the field in the present case. Since the Petitioner has challenged the Authority of passing the impugned order and the relief has been sought only against the authority passing the impugned order, in my opinion, non inclusion of the Respondent No. 4 at the time of filing the writ petition cannot be said to be a suppression of material facts.

19. It is further contended by Mr. Sarma that the alleged agreement dated 4.11.95 which has been enclosed with the writ petition as Annexure-1 is an absolutely false and fabricated document and no agreement of such nature was ever executed by the Respondent No. 4 with the Petitioner who had never invested any money for building up the infrastructure of the business as regards the purchase of land, construction of godown etc. Further, Annexure-3 to the writ petition, the General Power of Attorney in favour of the Petitioner is also false and fabricated. Those are being the questions of disputed facts, this Court cannot go into the same. It is open for the parties to adjudicate upon those before an appropriate forum.

20. Mr. M.K. Choudhury, learned Counsel appearing on behalf of the IOC, the Respondent No. 3, has stated that the Petitioner is a stranger for them because the distributorship has been awarded only to the Respondent No. 4 and the Respondent 3 has not entered into any business whatsoever in this regard with the Petitioner. It is correct and admitted that the Respondent No. 4 is the sole distributor of the L.P.G. under the Respondent No. 3 but the Petitioner herein has sought for relief against the impugned order which has been passed by the district authority by which the trade of L.P.G. distribution run by M/s. Kamrup Gas Service have been stalled and no relief has been sought against the Respondent No. 3.

21. In view of what has been discussed and observed hereinabove and on meticulous scrutiny of the material available on record and also upon hearing the spirited arguments put forward by the respective counsel of the parties, it appears that the impugned order was passed without having any legal sanction under the Order and the same was also passed by an authority not competent to do so. More importantly the impugned order was also hit by the principles of natural justice. That being so, in my considered opinion, the impugned order is illegal and bad in law and liable to be set aside and quashed. Consequently the impugned order dated 27.9.2001 is hereby set aside and quashed.

22. In the result the writ petition succeeds and accordingly stands allowed. However considering the facts situation there shall be no order as to costs.