
(2005) 04 PAT CK 0003
In the Patna High Court
Case No : CWJC No. 3348 of 2005

Pinku Yadav

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 15-04-2005

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 89
Constitution of India, 1950 — Article 14, 19, 19(1)(g), 19(6)

Citation : (2005) 2 PLJR 702

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

Bench : Division Bench

Advocate : D.V. Pathy and Satyabir Bharti in 3348, 3511, S.N. Jha, Jitendra Singh, Kumar Abhimanyu Pratap, Madalsa Singh, Binod Kumar and Pramod Kumar, for the Appellant; R.K. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

Nagendra Rai, A.C.J.

1. The point involved in all the six cases are one and the same, as such they have been heard together and are being disposed of by the common order. The five writ applications relate to settlement of retail shops of country liquor and spiced country liquor in the district of Patna whereas the last CWJC No. 4050 of 2005 relates to the district of Katihar. The petitioners claim to be ex-licensees of the retail shops of country liquor/spiced country liquor for the year 2004-05 and have challenged the settlement of the said shops for the year 2005-06 by following the provisions of the Bihar Excise (Settlement of Licences for Retail Sale of Country/Spiced Country Liquor) Rules, 2004 (hereinafter referred to as the Rules). Though the petitioners have challenged Rule 5 of the Rules on the ground that the same creates monopoly in favour of certain persons and as such violative of Article 19(1)(g) of the Constitution of India as well as is arbitrary and violative of Article 14 of the Constitution of India, alternatively they have challenged on the ground that Rule 5 of the Rules has not been followed in

making the settlement.

2. The stand of the State is that the provisions of the Rules do not infringe the fundamental or legal right of the petitioners and thus within the competence of the Government to frame the Rules in the larger interest of the State revenue as well as to cover up the areas of unsettled shops which remained open to the smugglers and bootleggers. It is well settled that to part with the privilege of excise articles, the Government can consider the interest of its revenue. The Citizens cannot have fundamental right to trade or to carry on business in the properties and right belonging to the Government. There is no inherent right in a citizen to sell intoxicants. The State can control the business in intoxicants and in such a case no question of infringement of Article 19(1)(g) of the Constitution arises. Dealing in intoxicant is not a trade or business within the meaning of Article 19(1)(g) of the Constitution. Trade in liquor has been treated on a different footing from other trades. The restrictions which may not be permissible with other trades, are lawful and reasonable so far as the trade in liquor is concerned. The auction of excise shops are made for augmentation of revenue of the State and it is for the State to get the best available price for its valuable rights. Earlier the settlement for retail vend of country liquor was being made shop-wise through auction-cum-tender system as per the policy decision of the Government. Its working was good for few years but later on many retail shops remained unsettled and the details of unsettled shops in the years 2001-02, 2002-03, 2003-04 and 2004-05 have been given in the counter affidavit filed in one of the cases. As a result of non-settlement of the said shops, the State suffered a loss of huge amount which has been noticed by the Accountant General in his report. The State Government gathered information and found that the settlement of shops in group has earned more revenue in the neighbouring State of Uttar Pradesh and accordingly, the Government took a policy decision to make the rules with a view to ensure 100% settlement and lifting of minimum guaranteed quota as well as to counteract the illegal sale of liquor in the area of unsettled shops and accordingly, new Rules have been framed. A copy of the said Rules has been annexed as Annexure-A to the counter affidavit.

3. The further stand of the State is that the grievance of the petitioner that because of settlement of excise shops in groups many of small traders in liquor will suffer is also not correct as many of the small businessmen dealing in liquor have formed a partnership firm or company and have jointly filed tenders for taking the settlement.

4. It is admitted position that licences for sale of country/spiced country liquor in retail shops is governed by the Bihar Excise Act. It is also admitted position that earlier these shops were to be settled by public auction and for certain period licence was being renewed for five years and thereafter the Rule in question has come into force on 22nd May, 2004 which has been framed by the Bihar Government in exercise of power conferred u/s 89 of the Bihar Excise Act. Rule 5

of the Rules contains a provision for constitution of group of shops for the purpose of settlement which runs as follows.

5. Constitution of Group of Shops:

(1) Ordinarily, the licence of country liquor including spiced country liquor shops shall be settled in group through auction-cum-tender system.

(2) Ordinarily, a group of retail country liquor/spiced country liquor shops, situated in a sub-division, shall be constituted. But, if necessary in the interest of revenue, more than one group of country liquor/spiced country liquor retail shops may be constituted within a sub-division; after including country liquor/spiced country liquor shops situated in another sub-division but within the same circle.

(3) The settlement may also be made by combining the groups constituted at the level of sub-division in a District in the interest of revenue.

(4) The Collector of the district shall be competent to constitute the groups in the aforesaid manner.

(5) Without prior permission of the Excise Commissioner, the groups may not be constituted in any other manner.

5. According to the said rule, the method of settlement is the same as it was earlier, i.e. "the auction-cum-tender system" but the settlement is to be made in group and that shall be the ordinary procedure for settlement. However in the interest of revenue, more than one group of country liquor/spiced country liquor retail shops may be constituted within a subdivision, after including country liquor/spiced country liquor shops situated in another sub-division but within the same circle. It also authorises the Collector to make the settlement by combining the groups at the level of sub-divisions in the district in the interest of revenue. The groups may not be constituted in any manner without prior permission of the Excise Commissioner.

6. In the district of Patna, the notification in Form 127 for the year 2005-06 was issued by the Collector, Patna in group (Ka) and (Kha). Group (Ka) consists of Patna Sadar Danapur and Paliganj Sub Divisions and Group (Kha) consists of shops located in Patna City, Massaurhi and Barh Sub-Divisions. As auction has been held and Group (Ka) has been settled to Kaven Traders Private Limited for Rs. 17.5 Crores and group (Kha) has been settled to M/s Scope Sales Pvt. Limited for Rs. 14.25 crores. With regard to Katihar district also settlement has been made in terms of Rule 5 of the Rules.

7. Learned Counsel appearing for the petitioners raised two submissions; firstly they submitted that by creating a groups of shops in a Sub-division and making the settlement of the same creates monopoly in favour of certain influent person and depriving the retailers of their right to participate and as such on this ground the action is violative of Articles 14 and 19(1)(g) of the Constitution of India.

Secondly they submitted that Rule 5 has not been followed in the matter of settlement. So far district of Patna is concerned as shops grouped in three Sub-Divisions each have been again grouped under category (Ka) and (Kha) which is not permissible under the said rule.

8. Learned Counsel appearing for the State on the other hand submitted that State has power to make the rules and regulations and nobody has inherent and fundamental right to trade in liquor and no monopoly has been created in favour of other person. On the other hand for the purpose of enhancing the revenue and in public interest, the shops have been grouped together and the settlement is made through the tender-cum-auction system giving opportunity to the eligible person to participate in the same.

9. The settled law is that neither there is inherent right nor fundamental right of a citizen to trade in liquor. It is also settled that the Government has exclusive right to settle the same and it may regulate, restrict or even totally prohibit in trade in liquor. The State has also right to trade in liquor for the purpose of enhancing the revenue and it can control it in public interest to prevent the illegal trade in liquor. It is also well settled that trade in liquor is not covered by Article 19(1)(g) of the Constitution of India.

10. Learned Counsel appearing for the petitioners did not dispute the settled proposition but submitted that a sort of monopoly is being created in favour of a person by forming the groups of shops by Rule 5 of the Rules and as such the action is arbitrary, unreasonable and violative of Articles 14 of the Constitution of India. They relied upon the judgment of the Constitution Bench of the Supreme Court in the case *Cooverjee B. Bharucha vs. Excise Commissioner and the Chief Commissioner, Ajmer and others*, reported in AIR 1954 Supreme Court 220. Learned Counsel appearing for the State has also relied upon the said judgment.

11. In that case two questions were considered; the first is as to whether there is fundamental right to carry on trade or business in liquor under Article 19(1)(g) of the Constitution of India and the second is as to whether the State Government can create monopoly with regard to trade and business in liquor by creating right in favour of one or more persons to the exclusion of others and that creation of such monopoly rights could not be protected by Article 19(6) of the Constitution of India. Dealing with the said matter, the Apex Court held that the State can regulate the trade in liquor in all its different spheres and relying upon the judgment in the case of *Crowley vs. Christensen* (1890) 34 Law Ed. 620(A) it was held in placitum (b) as follows:

"The legislature of a State is fully competent to regulate the business of vending intoxicating liquor, to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen. As it is a business attended with danger to the community, it may be entirely prohibited, or be permitted under such; conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the

governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only. Hence, the provisions of the (Ajmer) Excise Regulation (I of 1915) purporting to regulate trade in liquor in all its different spheres are valid."

12. It was also held by the Apex Court in that case with regard to question of creation of monopoly that elimination and exclusion from business is inherent in the trade of liquor and the principles which apply to other business cannot be applied in the business of liquor. The question of monopoly will arise only when the business is entrusted to one person to the exclusion of others but when it was being held on public auction then it cannot be said that monopoly is being created. In this connection, it is relevant to refer placitum (c) which runs as follows;

"The contention that the effect of some of the provisions of Excise Regulation (1 of 1915) is to enable Government to confer monopoly rights on one or more persons to the exclusion of others and that creation of such monopoly rights could not be sustained under Article 19(6), Constitution of India, is without force. Elimination and exclusion from business is inherent in the nature of liquor; business and it will hardly be proper to apply to such a business principles applicable to trades which all can carry. The provisions of the Excise regulation (1 of 1915) cannot be attacked merely on the ground that they create a monopoly.

There can be a monopoly only when a trade which can be carried on by all persons is entrusted by law to one or more persons to the exclusion of the general public. But when a contract is thrown open to public-auction, it cannot be said that there is exclusion of competition and thereby a monopoly is created. Further in certain circumstances exclusion of competition so as to create a monopoly either in a State or in some other body may be justified. Every case must be judged on its own facts and in its own setting of time.

For these reasons the contention that the provisions of the Excise Regulation (1 of 1915) are unconstitutional as they abridge the rights of the petitioner to carry on liquor trade freely cannot be sustained."

13. It will be proper to mention another judgment of the Supreme Court, which has been referred to by some of the counsel appearing in the cases, in the case of Rasbihari Panda etc. vs. State of Orissa, reported in AIR 1969 Supreme Court 1081, where the State Government of Orissa invited offers for advance purchase of Kendu leaves only from persons who purchased these leaves from individual units during the previous year and who acted as purchasers without default and to the satisfaction of Government and the method of sale by open competition was given up and that provision was held to be violative of Articles 14 and 19 of the Constitution as the same violated the fundamental rights of the petitioners who were deprived in participation. This judgment has no application in these cases as in the case of Cooverjee B. Bharucha (supra) it has already been held

that trade in liquor cannot be equated with other trade and creation of monopoly has a different yardstick with regard to sale in liquor than the other trades.

14. Reliance was also placed by the counsel for the petitioners upon the decision of the Supreme Court in the case of Association of Registration Plates vs. Union of India and others, reported in (2004)5 Supreme Court Cases 364 where the Bench consisting was of two Hon"ble Judges of the Apex Court and there was disagreement between the two Judges and the matter had been referred to the Larger Bench. However, the Learned Counsel appearing for the petitioners relied upon the judgment rendered by G.P. Mathur, J. wherein it was held that the State cannot confer monopoly on a single person as that is violative of Article 19(1)(g) of the Constitution. That was a case of entrusting the job of supplying High Security Vehicle Registration Plates to a single licence plates manufacturer. The said decision is not with regard to settlement of licence for retail sale in country liquor or spiced country liquor and as already stated, different principle will apply with regard to trade in liquor, which is injurious to the public, than the other trade and as such that judgment cannot be of any held to the petitioners.

15. Learned Counsel appearing for the petitioners also raised that the petitioners being ex-licensee has a legitimate expectation and that the same procedure will be valid for settlement of sale of country liquor/spiced country liquor and by framing the Rules, the legitimate expectation has been frustrated and in support of the same, they relied upon a judgment of the Supreme Court in the case of Union of India & others vs. Hindustan Development Corporation and others, (1993)3 Supreme Court Cases 499. That judgment, in our view, does not support the case of the petitioners. The question determining as to whether the legitimate expectation is in favour of a person or not has not to be judged according to claimant's perception but according to larger public interest. In the present case, the Government in larger public interest has made the Rules, the same cannot be nullified on the ground of legitimate expectation and as such the petitioners have no absolute right to trade in liquor and the Government has power to control and regulate the trade in liquor and it can make the Rules in exercise of the power conferred on it and change the policy and the same cannot be challenged unless it is wholly arbitrary on the well settled ground.

16. Thus, the first submission advanced on behalf of the petitioners is devoid of any substance. No monopoly is being created in favour of specified class of persons. The settlement is being made through auction-cum-tender system and as stated by the Apex Court that a sort of monopoly can be created by the Government in such matter, though that is not the case in this case.

17. Coming to the second point, the main grievance of the petitioners, as mentioned above, is that the State can form a group of country liquor and spiced liquor shops situate in the same Sub-division and it can also club together falling in two subdivisions but within the same circle but forming the groups of shops in a subdivision and then clubbing together several sub-divisions to form the group of shops is not permissible under Rule 5 of the Rules which has been done in the

cases with regard to settlement of shops in the district of Patna.

18. In our view, Rule 5(3) is answer to their submission which provides that the settlement may also be made by combining the groups constituted at the level of subdivisions in the district in the interest of revenue. The whole scheme of the Act is that the shops falling within one sub-division should be grouped as a single group. However, in the interest of revenue, shops falling within two sub-division may be also grouped together provided they fall within one circle, but in the interest of revenue, the settlement can also be made by combining the groups constituted at the level of sub-divisions in the district. All the situations which have been visualized by the law makers have been included in the Rule authorising the Collector to re-group the shops in the interest of revenue but many situation may not be visualised at the time of making the Rules for which sub-rule (5) of Rule 5 has been framed to group the shops in a different manner provided prior permission of the Excise Commissioner is taken. There is no challenge to the validity of the Rule. It is clear that in terms of sub-rule (3) of Rule 5 of the Stiles, two groups have been created; Group (Ka) and Group (Kha) in the district of Patna, each comprising three sub-divisions. There is no violation of Rule 5 of the Rules.

19. So far Katihar is concerned, no such point with regard to group has been made. In the result, to/e do not find any merit in these writ applications and, accordingly, the same are dismissed.

S.N. Hussain, J.

I agree.