(2010) 09 PAT CK 0068

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 8256 of 1994

Prakash Kumar, Abhishek Kumar and Punam Devi — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 06-09-2010

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 44, 90
Bihar and Orissa Excise Rules, 1919 — Rule 100
Contract Act, 1872 — Section 56

Citation : (2011) 2 PLJR 47

Hon'ble Judges : S.K. Katriar, J;Birendra Prasad Verma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Birendra Prasad Verma, J.—The present writ petition has been filed for setting aside the demand notice dated 28.01.1991 (Annexure-7), issued under the signature of Incharge Superintendent of Excise, Bhojpur, Ara, whereby the original writ Petitioner, Bipin Bihari Prasad, who died during the pendency of the present writ petition on 08.02.2004 and has been substituted by the order of this Court by the present Petitioners, who happen to be his legal heirs, was directed to deposit Rs. 2,94, 250/- for compensating the revenue loss caused to the State of Bihar purportedly under the terms of agreement dated 22.03.1990. The original writ petitioner also challenged the order dated 10.09.1991 passed by the respondent- Excise Commissioner, Bihar (Annexure-8), as also the resolution of the Board of Revenue dated 08.06.1994 (Annexure-9), whereby the prayers made on behalf of the original writ petitioner for setting aside the demand notice dated 28.01.1991 (Annexure-7) and for refund of advance licence fee and security amount, have been rejected.

2. The relevant facts essential for disposal of the present writ petition can be noticed as hereunder. The original writ Petitioner was the licensee for Piro country spirit shop in the district of Bhojpur (hereinafter referred to as the shop

in question for brevity) during the financial year 1989-90 on the monthly licence fee of Rs. 30,000/-. While the Petitioner was still having the valid licence, the State Government came with a new policy decision on the basis of the recommendations made by a High Power Committee regarding settlement of retail vends of country liquor, spiced country liquor, and India made Foreign Liquor. The aforesaid policy decision of the State Government was communicated through a letter dated 8th February, 1990, issued by the Excise Commissioner and Secretary of the Government, which was addressed to all the District Collectors and Deputy Commissioners, vide Annexure-1 to the writ petition. According to the aforesaid revised policy decision the settlement of retail vends for the country liquor etc. was to be made for five years instead of one year and, accordingly, licensees of the year 1989-90 against whom there was no complaint and any arrear of the Government, their licences were required to be renewed for five years, i.e., for the year 1990- 91 to the year 1994-95 with certain conditions particularly regarding enhancement of 10% of licence fee per annum and 5% enhancement of minimum guaranteed quota.

3. It is the common case of the parties that as the original writ Petitioner was licence- holder of the retail vend at Piro during the financial year 1989-90, he made an offer to take settlement of the shop in question for five years as per conditions mentioned in the revised policy decision dated 08.02.1990 (Annexure-1). It is also admitted case of the parties that an agreement was signed by the original writ Petitioner at one side and the competent authority of the Respondent-State at the other side on 22.03.1990 for renewal of his licence for five years, where-after the Petitioner deposited Rs. 1,98,000/- as advance licence fee for six months and Rs. 30,000/- as security amount. However, despite the agreement signed on 22.03.1990 licence was never issued to the original writ Petitioner for the financial year 1990-91 commencing w.e.f. 01.04.1990.

4. Before the agreement dated 22.03.1990, signed under the provisions of revised policy decision of the State Government, could have become operational w.e.f. 01.04.1990, (Jagarnath Prasad v. State of Bihar and Ors. C.W.J.C. No. 1455 of 1990) and few other writ petitions were filed before this Court challenging the validity and legality of the revised policy decision dated 08.02.1990. The aforesaid writ petition was admitted by a Division Bench of this Court by an order dated 09.03.1990 (Annexure- 2) and an interim order was passed, relevant portion of which is reproduced herein below :-

In the meantime, it will be open to the Respondent State and its authorities to make settlement in respect of different country liquor, foreign liquor and spiced liquor shops in the State of Bihar for one year only through public auction and in accordance with rules, which existed prior to the amendments introduced in those rules, which are under challenge. The Learned Advocate General pointed out that in some areas it is not profi to hold public auction in respect of such shops and because of that amendments have been introduced in the rules by making provisions for settlements on the basis of enhanced rate without public auction. We may point out that proviso to Rule 100, which was substituted in the year 1984 vests power in the Commissioner of Excise to pass orders in appropriate cases for settlements of such shops without public auction. As such, it will be open to make settlements of such shops without public auction on the basis of the orders passed by the Commissioner of Excise in appropriate cases. But the period of such settlements shall not exceed four months. It is expected that before that period this Court shall dispose of this writ application. Let a copy of this order be given to the counsel for the Petitioner as well as to the Learned Advocate General.

5. In the light of the aforesaid interim order dated 09.03.1990 passed in C.W.J.C. No. 1455 of 1990, Respondent Excise Commissioner issued a communication dated 15. 03.1990 directing the Collectors and Deputy Commissioners of the Districts of Bihar to renew the licence of the previous licensees only for a period of four months, i.e., upto 31.07.1990. The direction issued by the respondent-Excise Commissioner was not truly in accordance with the interim order passed by this Court, and therefore it came up for consideration before the Division Bench on 23.03.1990. The Division Bench by its order dated 23.03. 1990 (Annexure-3) clarified the previous interim order dated 09.03.1990in the following terms, which are quoted herein below :-

Prima facie, we are satisfied that the communication give opportunity to the District Magistrate and the Deputy Commissioners to renew the licenses of the existing licensees up to 31st July, 1990, when that was to be done only in some appropriate cases. Normally, we would have passed a further order not to allow the existing licenses to continue to run the country liquor shops in question beyond 31st March, 1990, in view of the interim order passed above, but the Learned Advocate General appearing for the State, submitted that without going into the question whether the communication dated 15th March, 1990, has been issued in terms of the interim order dated 09.03.1990, the revenue of the State should not suffer. The Learned Advocate General pointed out that it is not possible to hold public auction before the 31st March, 1990, as such the existing licenses should be allowed to continue on monthly licence fee in accordance with the terms of the licenses, which was operative upto 31st March, 1990, till 30th April, 1990 at enhanced rate except in such cases where steps for public auction have already been taken. He also stated that if no arrangement is made upto 30th April, all existing shops have to be closed upto 30th April, 1990, because no licence can be granted in the meantime after holding public auction. He also assured the Court that before 30th April, 1990, Public auction shall be held, in accordance with the Rules, and the period of such licenses shall be only one year and subject to the result of their writ application.

Accordingly, we direct that the steps for grant of licenses be taken after public auction before 30.04.1990 in terms of order aforesaid dated 09.03.1990. This direction shall not be applicable in respect of shops where public auction has already been held or are to be held prior to 31.03.1990.

6. Aforesaid C.W.J.C. No. 1455 of 1990 came up for further consideration on 13.04.1990 before a Division Bench of this Court where-after it was directed that the authorities can renew the licence for the year 1990-91 on monthly basis only. It would be apt to quote the relevant portion of the order dated 13.04.1990 (Annexure-4) , which is as follows:

We, therefore, direct the authorities to renew the licences for the year 1990-91 on monthly basis until the disposal of this writ application and until that is done the successful bidders in the auction will not be granted licence and in case the actual period is less than 11 months then there shall be a proportionate reduction in the bid amount. The orders dated 09.03.1990 and 23.03.1990 are modified to the extent indicated above.

7. Learned Counsel appearing on behalf of the Petitioners submitted that in view of the interim order passed by this Court, the policy decision of the State Government dated 08.02.1990 (Annexure-1) for renewal of licence for five years with certain conditions could not become operational. In view of the different interim orders passed by this Court, referred to above, firstly this Court directed the authorities for settlement of shops for one year only by public auction and in exceptional circumstances under the provision of Rule 100 framed by the Board of Revenue in terms of Section 90 of the Bihar Excise Act, 1915 (hereinafter referred to as the Act for brevity) the shops could have been settled without auction by an order of Excise Commissioner only for a period of four months. Subsequently the aforesaid interim order was modified and finally it was directed that the settlement has to be made on monthly basis only. Learned Counsel for the Petitioners contends that in the light of the interim order dated 23.03.1990 passed in C.W.J.C. No. 1455 of 1990, the Respondent- Excise Commissioner issued a letter dated 30.03.1990 (Annexure-5) fixing the dates for settlement of different shops of country spirit and spiced country spirit for the year 1990-91. The dates for settlement of shops for different districts were indicated in that letter itself and for the district of Bhojpur it was fixed for 18.04.1990.

8. It was further contended that in view of changed circumstances in the light of the interim orders passed by this Court, referred to above, and in the light of the letter dated 30.03.1990 (Annexure-5) issued by the Excise Commissioner, the original writ petitioner submitted an application on 05.04.1990 (Annexure-6) before respondent no.5, indicating therein that under the changed circumstances he was no longer interested in taking the licence for the shop in question.

9. In terms of the letter dated 30.03.1990 of the Excise Commissioner (Annexure-5) the auction for the shop in question through public notice was held on 18.04.1990, but the shop in question was not settled as only one person turned up for participating in the bid. Fresh public auction was notified for few other dates, but the shop in question could not be settled in favour of any one and finally on the basis of public auction held on 06.12.1990 shop in question was settled in favour of one Rajendra Prasad on monthly licence fees of Rs. 35,000/-.

10. Learned Counsel for the Petitioners submitted that for non-settlement of shop in question for eight months, the original writ Petitioner could not have been held responsible and on the basis of agreement dated 22.03.1990, Respondent No. 5 could not have issued the impugned demand notice dated 28.01.1991 (Annexure-7) directing the original writ Petitioner to compensate the revenue loss for the aforesaid eight months, i.e., from 01.04.1990 till the settlement on 06.12.1990. He further contends that in view of the interim orders passed by this Court, the Respondent- State and its authorities have themselves wriggled out from the agreement dated 22.03.1990, and therefore they cannot compel the petitioners to compensate the loss sustained by the respondent- State due to non-settlement of shop in question for about eight months. Apparently, respondent- authorities could not have implemented the agreement dated 22.03.1990 entered with the original writ petitioner, renewing his licence for five years, in view of the interim orders passed by this Court . Further in a changed circumstances by letter dated 05.04.1990 original writ petitioner had surrendered his licence and had expressed his unwillingness to have the licence either for four months or one month. It was also highlighted that though agreement was signed on 22.03.1990, but the licence for the period 1990-91 was never issued in favour of original writ petitioner by the authorities concerned. In the aforesaid circumstances the original writ petitioner was entitled to receive refund of advance licence fee deposited for six months to the tune of Rs. 1,98,000/- and Rs. 30,000/- as security money.

11. Placing reliance on Section 56 of the Indian Contract Act, 1872 it was submitted that any agreement to do an act which, after execution of the agreement becomes impossible or unlawful, then such agreement becomes void. According to the learned Counsel for the Petitioners since the terms of agreement dated 22.03.1990 was impossible to be implemented, it became void and the revised policy decision of the State Government dated 08.02.1990 became non-operational in the light of interim orders passed by Division Bench of this Court. Therefore, the Respondent-authorities cannot take any benefit of the condition No. 3 of the said agreement dated 22.03.1990. According to him the respondent- Excise Commissioner while passing the impugned order dated 10.09.1991 (Annexure-8) and the Member, Board of Revenue while passing the impugned resolution dated 08.06.1994 have not taken into consideration the aforesaid aspect of the matter and, therefore, they have erred in rejecting the prayers made on behalf of the original writ petitioner.

12. Learned Additional Advocate General No. 3, appearing on behalf of the Respondent- State and its authorities submitted that since the original writ Petitioner had signed the agreement dated 22.03.1990 for renewal of his licence for five years and had deposited Rs. 1,98,000/- towards the advance licence fee for six months and had further deposited Rs. 30,000/- towards security amount, as per the terms of the revised policy decision dated 08.02.1990 (Annexure-1), it was not open for him to challenge the very terms and conditions of that agreement. He further contended that even if licence was not issued to the

original writ Petitioner in the light of the revised policy decision, yet he would be deemed to be the holder of the licence as per provisions contained in ''Explanation'' of Section 44 of the Act, 1915. He contended that in view of Condition No. 3 of the agreement the original writ Petitioner was obliged to compensate the revenue loss sustained by the State of Bihar for the period of eight months during which the settlement of shop in question could not be made despite public auction held by the authorities concerned. He also contended that since the original writ petitioner had not challenged the policy decision dated 08.02.1990 by filing any separate writ petition or by filing an intervention petition in C.W.J.C. No. 1455 of 1990, therefore, he was bound by the terms and conditions of the agreement signed by him on 22.03.1990. On the basis of above submissions he has supported the impugned demand notice, as contained in Annexure-7 as also the impugned orders, as contained in Annexures-8 and 9.

13. I have perused the materials available on record and have considered the submissions advanced on behalf of the parties.

14. It is apparent that in view of the interim orders passed by Division Bench of this Court on 09.03.1990, which was further clarified on 23.03.1990 and 13.04.1990 the revised policy decision dated 08.02.1990 (Annexure-1) was never made operational. The licences were required to be renewed w.e.f. 01.04.1990 for five years, but prior to that interim order dated 09.03.1990 was passed by which licences were required to be issued only through public auction for a period of one year and in exceptional circumstances licences could have been renewed for a period of four months by order issued by the Excise Commissioner. In that background this Court is of the considered opinion that in the light of interim orders, referred to above, the agreement dated 22.03.1990 became impossible to be implemented and thus it became void. Respondent-authorities also held public auction for settlement of shop in question as early as on 18.04.1990 and the original writ petitioner had already filed his application on 05.04.1990 surrendering his licence. Therefore, since the shop in question could not be settled through public auction, the original writ petitioner could not be held responsible for the same and on the basis of a void agreement he could not have been asked to compensate the revenue loss sustained by the State of Bihar.

15. For the reasons recorded above, the writ petition is allowed. The impugned demand notice dated 28.01.1991 (Annexure-7) as also the impugned order dated 10.09.1991 (Annexure-8) and impugned resolution of Board of Revenue dated 08.06.1994 (Annexure-9) are set aside. Respondents No. 4 and 5 are directed to refund Rs. 1,98,000/- (Rs. One lac ninety- eight thousand) deposited by the original writ petitioner as advance licence fee for six months and Rs. 30,000/- (Rs. Thirty thousand) as security money with interest to the petitioners expeditiously. The petitioners are entitled to receive interest @ 6% from the date of deposit till the date of actual payment to be made by the authorities concerned. In the facts and circumstances of the case, there shall be no order as to costs.

I agree.

