

(2002) 08 PAT CK 0064
In the Patna High Court
Case No : C.W.J.C. No.7075 of 2002

Premlata Gupta

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 13-08-2002

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 89
Bihar and Orissa Excise Rules, 1919 — Rule 44, 45, 46
Constitution of India, 1950 — Article 14

Citation : AIR 2004 Patna 2 : (2002) 50 BLJR 1816 : (2002) 3 PLJR 769

Hon'ble Judges : R.S. Garg, J; Nagendra Rai, J

Bench : Division Bench

Advocate : Ram Balak Mahto and rajni Kant Jha, for the Appellant; R.K. Dutta, S.C. IV for State, Tara Kant Jha G.P. Bimal and Satya Bir Bharti, for the Respondent

Judgement

1. By this petition the petitioner seeks a writ, order and direction in the nature of certiorari quashing the orders dated 19-6-2002/21-6-2002 passed by the learned Member, Board of Revenue in Revision Case No. 57/2002, the order dated 18-3-2002 passed by the Excise Commissioner in Case No. 16/2002 and the order No. 1180 dated 27-3-2002 under which the Collector/District Magistrate, Begusarai was informed by the Secretary to the Excise Commissioner that an additional licence for IMFL (wholesale) has been sanctioned for Begusarai.

2. The facts in nutshell are that the petitioner's husband late Anil Kumar Gupta obtained a wholesale licence to deal in foreign liquor in the year 1984. After the death of the husband, the petitioner obtained the said licence and thereafter continued to hold the same for these years. According to the petitioner, the Excise Superintendent, Begusarai prepared a list of different categories of excise licence to be settled and sent a proposal to the Collector, Begusarai for the year 2002-2003. The Collector, Begusarai approved the aforesaid list prepared by the Excise Superintendent and sent the same on 8-1-2002 to the Excise Commissioner, Bihar vide

his letter No. 360 dated 23-1-2002 sanctioned and approved grant of one licence for wholesale trade of India made foreign liquor and 28 foreign liquor retail shops for Begusarai District. The petitioner says that after being satisfied that there would be only one sanctioned wholesale licence for Begusarai in accordance with the directions issued by the authorities, she deposited a sum of Rs. 1,50,000/- and obtained the licence for the wholesale business. It is the case of the petitioner that after obtaining the licence she invested a huge amount to cater to the needs of consumers of foreign liquor and made number of commitments and contracts with different companies. The petitioner says that one Shiv Kumar Bhagat, respondent No, 6 approached the Collector for granting one additional wholesale licence. The Collector thereafter wrote a letter to the Excise Commissioner for sanction of one additional foreign liquor wholesale shop to be allotted in favour of said Shiv Kumar Bhagat under his letter No. 55 dated 22-1-2002. The Excise Commissioner after receipt of the said letter did not concede to the request made by the Collector and under his letter dated 6-2-2002 informed the Collector that the recommendation could not be made for a particular person but the recommendation could be made for sanctioning of one additional wholesale licence looking to the demand and need of the public. The petitioner says that said Shiv Kumar Bhagat is already having three liquor wholesale shops - two in Patna and one in Purnea. It is contended that said Shiv Kumar Bhagat exercised tremendous pressures - political and otherwise on the Collector, Begusarai and the Collector after refusal of his first recommendation sent yet another letter on 13-2-2001 making a recommendation that one additional wholesale shop licence be granted. According to the petitioner, such a recommendation could not be made, therefore, he appeared before the Excise Commissioner and objected to the grant of the additional licence.

3. The submission of the petitioner is that the Excise Commissioner sanctioned additional wholesale licence without considering the objections of the petitioner on the surmises that there had been increasing consumption of foreign liquor in the District and by his order dated 18-3-2002 sanctioned the additional licence. The petitioner wants to say that on number of earlier occasions the applications for additional licences were rejected observing that the present petitioner was working properly, nobody was having any complaint and the petitioner could fulfil the need of the shop-keepers. In support of this submission the petitioner has filed certain certificates and the inter-departmental communications. The petitioner says that on 17-7-2000 the application of one Sunil Kumar Rai for grant of additional licence was rejected by the Excise Commissioner, therefore, also there was no need for the Collector to make the recommendation for granting additional licence. It is contended that the order passed by the Excise Commissioner was patently illegal. It is also contended that the order of the Excise Commissioner was communicated to the Collector under Letter No. 1180 dated 27-3-2002 and the same reached the Office of the Collector on 2-4-2002 but the Collector who was keeping the hawk's eye on the subject issued the public notice in the newspaper on 28-3-2002 itself. On strength of it, it is sought

to be contended that the Collector was getting himself in touch with everything and was trying to take immediate action. The petitioner says that under some wrong advice he had filed the civil suit but the same was ultimately dismissed. However, the petitioner also filed a Revision Case No. 57/2002 against the order of the Excise Commissioner to the Board of Revenue. It is also contended that the petitioner filed C. W. J. C. No. 4607/2002 which was disposed of by this Court on 15-4-2002 with the observation that as the matter was pending before the Board of Revenue, the High Court should not express any opinion on the merits of the matter. The High Court observed that till the matter is decided by the Board of Revenue no steps should be taken for grant of additional wholesale licence to vend in foreign liquor.

4. According to the petitioner, the revision case was dismissed by the Board of Revenue on 19/21-6-2002 observing that the order passed by the subordinate authorities was justified. The order passed by the Board of Revenue has been condemned on the ground that the Member, Board of Revenue did not address himself to the legal questions raised before him. The petitioner says that question of the additional licence is to be considered in accordance with Rule 45 of the Bihar Excise Rules 1951 and as the true import of Rule 45 has not been taken into consideration, the order is bad. The petitioner says that the present trend of consumption of liquor does not show any hike in it but shows that the trend is having a descending order. The petitioner says that the order passed by the Member, Board of Revenue was patently illegal -- firstly because the requirements of Rule 45 of the Act have not been considered and secondly, the consumption pattern has not been properly appreciated. It is also contended that from the earlier reports of the Collectors and the orders passed by the Excise Commissioner, it would clearly appear that there was no need of any additional licence. It is also contended by the petitioner that it would be unfair and illegal on the part of the respondent-State to settle yet another foreign liquor wholesale shop for the same year because it is likely to adversely affect the business of the petitioner. In paragraph 30 it has been contended by the petitioner that if any additional wholesale shop of foreign liquor is to be opened in Begusarai District, the authorities are free to do so but for the next financial year. On the basis of these allegations and submissions it was contended that the petitioner is entitled to the relief.

5. On 1-7-2002 the petitioner made an application for amendment of the petition. It is contended in the said application that the case was listed on 28-6-2002, the respondent No. 6 prayed for an adjournment though the prayer was innocuous, but in fact it was motivated and was with ulterior purposes. The petitioner says that after receipt of the order passed by the Board of Revenue, the Collector constituted a committee on 24-6-2002 to examine the applications of the prospective licensees. On 27-6-2002 the committee submitted the report, on 28-6-2002 the present petitioner after learning from the sources that there was every likelihood of issuing a licence made an application to the Collector that the matter was pending before the High Court, therefore, the licence be not

issued and despite her protest and objections on 28-6-2002 itself the Collector issued the licence during the pendency of this writ application. The petitioner, therefore, prayed that the amendment be allowed and the grant of licence and issuance, of the licence be also quashed.

6. On 3-7-2002 the respondent No. 6 submitted its counter affidavit. It is contended by the respondent No. 6 that the petitioner somehow or the other could manage the grant of single licence and thereby was creating a monopoly in the said area. It is contended that if for last 18 years only one wholesale licence existed, that too in favour of only one person, then that would speak bad against the administration and would show that the fair competition even in the excise matters is not allowed to be raised. It is also contended that in other districts, more than one licences have been issued therefore, if the Collector of Begusarai District made the recommendations for grant of one additional licence of opening of one wholesale shop then no wrong can be found with the recommendations made by the Collector. It is contended that in Purnea where there are 28 retail shops, there exist three wholesale shops while in Begusarai for 28 retail shops, there is only one wholesale shop. Referring to the trend of consumption, it is contended that the consumption in the year 1985-86 was 12655 litres which rose upto 3,36,326 litres for the year 1999-2000 and even the trade bar for 2001-2002 is showing a hike. It is contended that the petitioner by having the monopoly is minting money and is not allowing the fair competition. It is also contended that the respondent No. 6 was justified in making the application to the Collector and looking to the trend of consumption, the Collector was also justified in recommending grant of additional licence. The respondent-State and the respondent No. 6 have submitted that the order dated 18-3-2002 was received by the Collector on 21-3-2002 and not on 2-4-2002, as asserted in paragraph 18 of the petition. It is submitted that the matter being urgent, the Collector was justified in issuing the public notice. Referring to Rule 45 of the Act is contended that Rule 45 would not apply to the facts of the case. It is contended that the petitioner or anyone else cannot claim monopoly in the business because the State Government is entitled to create extra licence.

7. In the other counter affidavit it is further contended that the present petitioner cannot challenge the grant of additional wholesale licence because she did not participate in the tender process. It is contended that he has the experience in the trade of liquors and holds a certificate of solvency to the extent of Rs. 75 lacs and has filed the income tax return in the past to the tune of Rs. 25 lacs, which goes to show his financial capabilities and experience in the trade. It is contended that the Collector was absolutely justified in granting the licence in favour of the respondent No. 6 because the matter was urgent and the Collector was interested in the revenue. It is also submitted that the submissions of the petitioner, that the respondent No. 6 was obliged out of the way, are incorrect. It is contended by the respondent No. 6 that he had submitted his application in accordance with the requirements of the advertisement, his application was absolutely correct and no wrong can be found in his application.

8. In the counter affidavit dated 9-7-2002 it is contended that the submissions made by the petitioner that his application was incomplete, in fact, were false and false to the knowledge of the petitioner. It is contended that the department was absolutely justified in awarding one more licence.

9. This writ petition came to be filed on 27-6-2002. It came up for consideration before the Court on 28-6-2002 and on the same day a copy of the writ petition was served on the respondent No. 6. From the records it does not appear that any prayer for adjournment was made on 28-6-2002, in fact, 28-6-2002 was the first date of hearing. On the said date, a copy of the writ petition was supplied to the counsel for the respondent No. 6 and this Court directed that the case be taken up for consideration on 2nd July, 2002. It appears that the matter came up for consideration on 4-7-2002. It was adjourned to 8-7-2002. This Court granted an interim order observing that grant of licence, if any, to the respondent No. 6 shall remain stayed. The District Magistrate, Begusarai was directed to remain in attendance in the Court on 8-7-2002 along with the original records. The matter came up for hearing on 9-7-2002. The Collector, Begusarai did not appear in the Court but, however, the original records were produced.

10. We have gone through the original records. From the records it would clearly appear that number of the persons made application for settlement of the wholesale shop and grant of additional licences.

11. From the report of the Excise Inspector, it appears that the application submitted by the respondent No. 6 was complete in all respects. The Excise Inspector also found the application of Bal Mukund Singh and Raushan Kumar to be complete. From the records it appears that Shiv Kumar Bhagat, respondent No. 6 was found to be best amongst the lot. After going through the records, we are unable to hold that the application submitted by the respondent No. 6 was incomplete or the recommendations made in favour of the respondent No. 6 were bad. The original records do not show any unfair play in favour of the respondent No. 6.

12. The question for consideration before us is that whether the Collector was justified in recommending one more shop even when he had made the first recommendation for only one wholesale licence and 28 retail shops.

13. From the records it would appear that the first of the recommendations was made by the Excise Superintendent and the said recommendation was a routine recommendation. The recommendations were forwarded to the Excise Commissioner on 8-1-2002 and the Excise Commissioner vide his letter dated 23-1-2002 sanctioned and approved grant of one wholesale licence and 28 retail shops for IMFL. The real problem arose subsequent to it. From the records, it appears that on 22-1-2002, much before the settlement of the shop in favour of the present petitioner, the Collector had made a recommendation in favour of the respondent No. 6, Shiv Kumar Bhagat that an additional licence be sanctioned. From the letter dated 6-2-2002 issued by the Commissioner, Excise it clearly

appears that the Commissioner, Excise was not opposed to the recommendation for one more shop but was advising the Collector that the recommendation cannot be made in favour of a particular person and if the Collector was of the opinion that an additional wholesale shop should be opened then in accordance with law a proper proposal may be sent. After receiving the letter dated 6-2-2002 the Collector vide his letter dated 13-2-2002 made yet another recommendation for opening a shop. It appears that the recommendations dated 13-2-2002 were showing the very same subject, that is, an additional licence in favour of Shiv Kumar Bhagat. From this letter dated 13-2-2002 it would clearly appear that the Collector was obsessed and was trying to place the point before the Commissioner, Excise that an additional licence should be allowed. In the recommendations made on 13-2-2002 the Collector did not refer to the trend of consumption or the requirement for any valid or legal reason. The recommendations simply state that if one more licence is granted then the State would be benefited by additional licence fees and because of the competition the consumption of liquor would increase which would augment revenue in favour of the State Government. Rules 44, 45 and 46 framed by the State Government in exercise of the powers conferred by Section 89 of the Bihar and Orissa Excise Act read as under:-

"44. Licences for the wholesale or retail vend of excisable articles may be granted for one year, from the 1st April to the 31st march, subject to the following provisions:--

(1) Licences for the retail vend of country spirit, foreign liquor and spiced country spirit may be granted for any number of years upto three years, beginning on the 1st April, in cases where the Excise Commissioner considers this advisable.

(2) If any licence be granted during the course of the financial year, it shall be granted only up to the 31st March, next following.

(3) Season licences for the sale of either fresh or fermented tari may be granted for periods fixed by the Collector.

(4) Temporary licences may be granted to provide for the supply of excisable articles on temporary and special occasions e. g., fairs, regimental camps of exercise, etc., and shall be limited to the period during which such temporary or special occasions last.

(5) Wholesale licences for the supply and sale of excisable articles may be granted for any number of years not exceeding five, as the Board may decide in each case."

"45. The number of licences which may be granted for any local area shall be regulated by the needs of the people of that area, and no licence for the sale of any excisable article in any local area shall be granted unless it is required either to meet an ascertained demand for such article or to counteract supply through illicit sources."

"46. The general principles below stated shall be borne in mind, and shall be applied by Collectors, so far as possible, in fixing the number of licences to be granted for the retail sale of liquor for consumption on the premises of the vendor:--

Liquor shops should not be so sparsely distributed as to give to each a practical monopoly over a considerable area, or at least such a monopoly should only be allowed when prices can be effectively fixed. At the same time two or more shops should not be equally convenient to a considerable number of persons. In other words, liquor shops need not be so limited in number as to make it practically impossible for a resident in a particular area to get his liquor except from one particular shop; but it should only be possible for him to get his liquor from two different shops at the cost of considerable inconvenience, and he ought to have as little freedom of choice in the matter as possible."

14. According to Rule 45, the number of licences which may be granted for any local area shall be regulated by the needs of the people of that area, and no licence for the sale of any excisable article in any local area shall be granted unless it is required either to meet an ascertained demand for such article or to counteract supply through illicit sources. A juxtapose reading of Rule 44 and Rule 45 would show that licences for the wholesale or retail vend shall be governed by Rules 44, 45 and 46. A fair perusal of Rule 45 would make it clear that the number of licences would depend upon the need of the people of that area and no fresh licence for sale of any excisable article would be granted unless it is required to meet the demand or to counteract supply through illicit sources. An additional licence can be granted, if the authorities are of the opinion that there is a hike in the demand or because of the less licences or shops, there is trafficking of illicit liquor or supply from illicit sources. A perusal of Annexure-7, the letter dated 13-2-2002, does not take into consideration either of the requirements of law. The letter simply recommends that if one additional licence is granted, the State would earn the licence fees and further revenue would be earned because of the competitive rates. In the opinion of this Court, the recommendations were not, in accordance with Rule 45 of the Act and the Collector had not taken into consideration either the hike in the demand to curtail the supply through illicit sources.

15. At this stage it would also be necessary to see the contents of Section 30 to Section 36 of Chapter VI of the Bihar and Orissa Excise Act, 1915. From a perusal of these Sections it would appear that before expiry of the period for which existing licences for retail sale are in force, the authorities are required to prepare a list showing that licences it is proposed to grant for the retail sale of spirit for consumption. Such a list is to be published for the public benefit, the list shall be published in accordance with the Rules, the objection shall be invited by the Collector and after the date prescribed for receipt of objections, the Collector shall consider the objections and opinions, if required, may revise the said list and shall decide for what place the licence shall be granted. The Excise

Commissioner is required to consider the list, objections and opinions so set to him and may modify or annul any order passed or licence granted by the Collector and, notwithstanding anything contained in Section 8, his orders shall be final. The provisions contained in Section 30 - 35 of the Act shall apply in respect of the licences for the retail sale, in any local area specified in any order made in this behalf on any other intoxicant specified in such order.

16. From the scheme of the Act it would appear that before the period of expiry of earlier licences a list is to be prepared, the same is to be approved by the Collector and is to be forwarded to the Commissioner for his approval. The list is in relation to the retail licence. While making a recommendation for retail licences, the Collector may also make recommendations for the wholesale licence. The wholesale licence is generally granted to cater to the needs of the retailers. Such a wholesale shop or wholesale licensee cannot sell the spirit/Indian made foreign liquor to the public. In fact he is the supplier to the retailers.

17. It would also be necessary to see Section 89 of the Act which allows the State Government to make rules. Section 89(1) says that the State Govt. can make rules to carry out the objects of the Act or any other law for the time being in force relating to the excise revenue. Section 89(2)(e) in particular provides that the State would be authorized to make rules for regulating the periods for which licences for the wholesale or retail vend of any intoxicant may be granted and the number of such licences which may be granted for any local area.

18. Exercising the said powers on 15-1-1990 the Rules have already been framed by the State Govt. and Rules 44, 45 and 46 (as referred to above) have already been framed relating to duration and number of licensees. When the State Govt. has already framed the Rules to regulate the period of the licence and the number of the licence for the wholesale or retail vend of any intoxicant then the said Rules would bind all concerned including the State Govt., the Board of Revenue, the Commissioner and the Collector.

19. In the opinion of this Court, non-observance of Rule 45, in fact, had vitiated the recommendations dated 13-2-2002.

20. From the order dated 18-3-2002 passed by the learned Commissioner. Excise though it appears that Rule 45 was brought to his notice but contrary to the contents of letter dated 13-2-2002 he observed that there was a hike in demand and because of one licence, number of the problems were created. It appears that what was not said in the recommendations was later on supplied in the comments by the Collector. The Commissioner, Excise observed that in view of the comments and recommendations made by the Collector there was no reason to disagree and one more licence could be allowed. The said order of the Commissioner, Excise came up for consideration before the Board of Revenue. From the order passed by the Board of Revenue it would appear that the thrust of the argument was non-observance of Rule 45. It was contended before the Board of Revenue that a licence holder/licensee has no right or authority to

challenge the creation of another shop or for grant of another licence. From the order it appears that the Board of Revenue was impressed by the fact that there was a constant rise in the demand since 1984 and grant of the licence was to augment the revenue in favour of the State and as such the licence was rightly granted. In the opinion of this Court, the approach of the Commissioner, Excise so also of the Board of Revenue was not justified, The authorities were not alive to Rule 45. As observed above, Rule 45 provides fixation of the number of licences for any local area on the strength of the need of the people of that area. According to Rule 45, no licence for the sale of any excisable article in any local area shall be granted unless it is required either to meet an ascertained demand for such article or to counteract supply through illicit sources. The recommendations contained in letter dated 13-2-2002 do not meet the mandatory requirements of Rule 45. A bare perusal of the recommendations dated 13-2-2002 would show that the Collector was making the recommendations on the ground that if an additional licence is granted it would earn revenue and because of the competitive rates the required consumption would increase and ultimately the State would be benefited. When a recommendation is made then the letter of the recommendation should be complete. What is lacking in the recommendation cannot be supplemented by the comments. In the present matter there was no recommendation by the Collector that in view of the ascertained demand an additional licence should be granted or to counteract supply through illicit sources an additional licence should be granted. From the order passed by the Commissioner, Excise it appears that the comments of the Collector were called for and in the said comments the Collector started relying upon the trend of consumption and the effect of the monopoly. In our opinion, the comments submitted by the Collector would not be a substitute for the recommendations.

21. The Board of Revenue in its order have simply looked into the form of the recommendation and not into the spirit of Rule 45. It was repeatedly submitted before him that Rule 45 has been violated but without referring to the language employed in Rule 45, the Board of Revenue approved the order passed by the Commissioner, Excise.

22. True it is that the State has the right to prohibit absolutely every form of activity in relation to intoxicants but once the State frames the Rules then all concerned would be governed by the said Rules. True it is that no person has a fundamental right to deal in the narcotic drugs, liquor or other excisable items but once the State Government starts issuing licences then the person would have a right to deal in such articles provided he has a valid licence.

23. True it is that the State Government is entitled to grant one or more licences in a particular area and no person would have any right to object to it but a licence or an additional licence can be granted in accordance with Rule 45 of the Act. Probably for these only reasons, the petitioner in paragraph 30 of the writ application has stated that the State Government could issue an additional

licence, but for the next year. In our opinion, the State has a right to create additional wholesale licence and the petitioner or any other licensee would have no right to object provided the requirements of the Rules are observed.

24. We would be in agreement with the respondents when they say that in areas of liquor trade, monopoly cannot be created. We would again be in agreement with the respondents when they say that if for all other districts more than one licence had been granted then more than one licence can be granted in the district of Begusarai. We would simply put a rider on the grant referring to Rule 45 that if the Collector after appreciating the trend of demand/ascertained demand comes to the conclusion that additional licence is required to be given or to counteract to the supply of illicit liquor through illicit sources additional licence is to be granted then certainly he can make such a recommendation. If such a recommendation is found to be valid then the Commissioner would have an authority to approve the recommendations and sanction additional licence. The only requirement for grant of the additional licence is compliance of Rule 45 and nothing beyond that. A person who holds a single licence cannot say that as his business would be adversely affected an additional licence cannot be granted. When the State is distributing the largesse in the field of excisable items then one cannot be allowed to have the monopoly in the subject. It also has to be seen at this stage that if there is one wholesale licence then such a person becomes a dictator and tries to control the market on its own terms which sometimes are oppressive. Though the competitive prices are not the consideration for grant of an additional licence but to control the monopoly an additional licence looking to the ascertained demand can always be made. Whether the single licensee is fulfilling the demands or not would not be the criteria but what is to be seen by the authorities is that in accordance with Rule 45 whether the additional licence can be granted or not. In the present case we are unable to hold that the recommendations made by the Collector were in accordance with law specially under Rule 45. The recommendation could not be approved by the Commissioner or by the Board of Revenue. As we are not approving the recommendations dated 13-2-2002 and are wishing to quash the orders passed by the Commissioner, Excise and the Board of Revenue, it is not necessary for us to look into the manner in which the licence was granted by the Collector in favour of the respondent No. 6. However, we would observe that a swift action always is not a bad action. The Collector acted swiftly but that does not mean that he was acting with ulterior motives, mala fide or under the dictates of the respondent No. 6.

25. At this stage we would also like to observe that the petitioner's contention that an additional licence cannot be granted during the term of the first licence is contrary to law. The licence fees for one year or any shorter period is the same. If somebody even for a shorter period finds that even after deposit of the licence fees, he would be able to earn something then the earlier licensee cannot raise any objection. In the matters of liquor and excisable items the equity has no role to play nor there can be a reasonable expectations of earning something from

the business. The principles of natural justice would also have no application to a case of liquor licence because the State alone has the monopoly to deal in such articles and it controls and regulates the sale of such articles through licensees.

26. The increase in present consumption would always be a ground for future. Even if there is no increase in the retail shops the trend in consumption in Begusarai shows that it is going on the higher side. We are, however, of the opinion that if a proper recommendation is made by the Collector then the matter should be considered by the Commissioner. The present appears to be a case where everybody wants to dig gold in the liquor business. The petitioner says that the monopoly should be maintained so that she may earn fortune while on the other hand the respondent No, 6 says that even for a shorter period he is ready to pay the licence fees because he expects to earn a good fortune.

27. Be that as it may, we are of the opinion that the recommendations contained in letter dated 13-2-2002 were not in accordance with the Rules, therefore, the said recommendations could not be accepted. The Collector and the Departmental officials shall be free to make fresh recommendations in accordance with Rule 45 of the Act. The recommendations contained in the letter dated 13-2-2002 (Annexure-7) are quashed. The petition to the extent indicated above is allowed.