(2004) 05 AHC CK 0136

In the Allahabad High Court

Case No : C.M.W.P. No. 585 of 2004

Ram Dularey Tiwari APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 21-05-2004

Acts Referred:

Uttar Pradesh Excise (Settlement of License for Retail Sale of Foreign liquor) (Excluding Beer and Wine) Rules, 2002 — Rule 8

Citation : (2004) 4 AWC 2940

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Advocate : Shashi Nondon and Pooja Agarwal, for the Appellant; Neeraj Sharma, S.C., for the Respondent

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The petitioner Ram Dularey Tiwari has prayed for a writ. order or direction in the nature of certiorari for quashing the order dated 22.3.2004 of the Excise Commissioner, U. P. Allahabad and the order dated 22.4.2004 of the State Government and also the order dated 20.4.2004 passed by District Excise Officer, Annexures-4, 6 and 8 to the writ petition. A writ in the nature of mandamus directing the respondent to renew the licence of the petitioner for foreign liquor shop Jajmau, District Kanpur Nagar and to restrain the respondents from interfering in the running of the business in any manner has also been prayed for.

2. The petitioner was granted a licence of foreign liquor shop for the financial year 2002-03 at Jajmau, District Kanpur Nagar. The said licence was renewed for the financial year 2003-2004. The petitioner applied for and was granted permission to take respondent No. 5 Sudeep Shukla as partner of the retail shop after depositing the necessary fee as provided by the U. P. Excise Settlement of Licence for Retail Sale of Foreign Liquor (Excluding Beer and Wine) Rules, 2001 (hereinafter referred to as "the Rules"). It appears that shortly after taking the

respondent No. 5 in the business a dispute has arisen in between the petitioner and the respondent No. 5 and the said dispute is still continuing in between them. However. after the close of the financial year, the petitioner alone applied for renewal of the licence in accordance with the aforesaid Rules, 2001, vide Annexure-7 to the writ petition. The petitioner has also deposited a sum of Rs. Nine lacs twenty thousand for renewal of the licence for the excise year 2004-2005 as per aforesaid Rules. The Excise Commissioner vide its order dated 22.3.2004 has refused to renew the licence in the name of the petitioner solely, on the ground that in view of Rule 8 (f) of the aforesaid Rules, Sri Sudeep Shukla, respondent No. 5 has acquired the partner''s status right and as such without his consent it would not be proper to renew the licence for the financial year 2004-05 without his consent. This order has been confirmed by the State Government vide order dated 22.4.2004 filed as Annexure-6 to the writ petition. On account of the dispute in between the petitioner and the respondent No. 5 shop remained close. The District Excise Officer issued a show cause notice dated 20.4.2004 vide Annexure-8 for taking an action against the petitioner and the respondent No. 5 for keeping the shop closed unnecessarily. Challenging the aforesaid orders this writ petition has been filed.

3. Heard the counsel for the parties and perused the record. The respondent No. 5 had filed a caveat and was granted time to file the counter-affidavit. He has filed the counter-affidavit and the petitioner has filed the rejoinder-affidavit. The respondent Nos. 1, 2, 3 and 4, officials of the Excise Department, have chosen not to file any counter-affidavit for the reason best known to them. Copy of the writ petition was served in the office of the learned standing counsel to file counter-affidavit on 28.4.2004 before the hearing of the writ petition for admission. The writ petition was taken up for admission on 30.4.2004. The time was again granted to the learned standing counsel to file counter-affidavit with the clear stipulation that if no counter-affidavit is filed by the department no further time shall be granted to the learned standing counsel. The office of the department is situate at Allahabad itself and the learned standing counsel has submitted that in spite of the communication sent by him to the department, the officials of department have not taken care to file a counter-affidavit and as such he can only argue the matter on the basis of the material already existing on the record. Looking to the urgency of the matter, petitioner as well as respondent No. 5, both express desire for early disposal of the writ petition. Consequently the writ petition was finally heard as only a limited question of law regarding interpretation of the aforesaid Rules, 2001 is involved.

4. The controversy lies in the narrow campus. The question which falls of the determination in the present writ petition is whether in the fact and circumstances of the case as narrated above, the authorities below were Justified to refuse to renew the licence in favour of the petitioner alone.

5. Sri Shashi Nandan, senior advocate assisted by Km. Pooja Agarwal. submitted that the petitioner is the sole licensee and the respondent No. 5 was admitted as

a partner to run the shop. Mere admission of respondent No. 5 as a partner to run the shop will not create any right in favour of the respondent No. 5 to claim the renewal of the licence in his name also. In contra, the learned counsel for the respondent No. 5 Sri Neeraj Sharma submitted that the respondent No. 5 has made huge investment and has paid the additional amount to the department in order to get their licence fee of the shop as per Clause (f) of Rule 8 of the aforesaid Rules and as such the licence can be renewed only in the name of the petitioner jointly with him.

6. I have carefully considered the rival submissions of the learned counsel for the parties. The learned standing counsel has tried to justify the impugned orders on the reasons mentioned in them.

7. Both the counsel for the parties have made reference of Rules 5 and 8 of the aforesaid Rules. For the proper appreciation of the controversy it is desirable to quote the said Rules. Rule 5 reads as follows :

"5. The period of licence shall be for an excise year or part thereof for which the licence has been granted. The licence may be renewed or extended with consent of licensee for another excise year or part thereof on such terms and conditions as may be decided by the State Government."

Rule 8 of the said Rules reads as follows :

"Eligibility conditions for applicant.-Eligible applicants for licence of a retail foreign liquor shop must fulfil following conditions, namely :

(a) be a citizen of India

Or

a partnership firm having not more than two partners and their partners are not partners in more than four such firms. Both being citizens of India. No change in partnership shall be allowed after allotment of shop(s):

Provided that if a licence is held by an individual, in the event of his death, his legal heir(s) if otherwise eligible, may continue to hold the licence for the remaining period of the licence ;

Provided further that if a licence is Jointly held by two partners, in the event of death of either of them, the survivor along with the legal heir(s), of deceased, if otherwise eligible, may continue to hold the licence or in case of death of both partners their legal heir(s) if otherwise eligible, may continue to hold the licence. No distinction will be made between the legal liabilities of the two partners who will be jointly and severally responsible.

(b) ....

(c) ....

(d) ....

(e) ....

(f) If any licensee wants to have partnership in his foreign liquor shop with any person or persons, he shall apply to the licensing authority with the detail of the person or persons with whom he wants partnership. Such partner or partners have to fulfil the conditions laid down in clauses (a), (b) and (c) and submit affidavit duly verified by a notary as proof of sub-clauses (ii), (iii), (iv), (v), (vi) and (vii) of clause (d). The licensing authority may allow the person or persons as partner of the shop if sum equal to 1% of the licence fee of the shop is deposited by such person or persons as the case may be in the Government treasury."

8. A copy of the licence has been filed as Annexure-1 to the writ petition. Under column No. 1 against the heading name. parentage and address of the licensee, the name of the petitioner No. 1 alone is mentioned. The said licence was granted initially for the financial year 2002-2003 and at that relevant point of time the respondent No. 5 was not on the scene. He entered into the scene subsequently on the strength of Rule 8 (f) of the said Rules. At the tail end of the licence, there is an endorsement by the District Excise Officer to the effect that on deposit of 1% of the licence fee on 24.5.2003 and in pursuance of the order of the District Magistrate, Kanpur Nagar dated 16.6.2003. Sri Sudeep Shukla (respondent No, 5) is endorsed in the licence as partner [sahbhagidaar]. On a close reading of clause (f) of Rule 8 it is clear that the licensing authority may allow the person or persons "as partner of the shop". To my mind, these words do indicate that such person may acquire status of partner of the shop alone. Admission of a person as a partner in the business subsequent to the grant of the licence will make such person only a partner of the shop and will not make such person a "co-licensee". Had it not been so, the words should have been used by the Government that such person would become a co-licensee. A plane reading of clause (f) clearly answers the issue raised in the writ petition. Under Rule 5, the licence shall be for an excise year or part thereof for which the licence has been granted. The licence may be renewed or may be extended with the consent of the licensee. The licensee in the present case is the petitioner alone in whose favour the licence stands, A reading of the licence also shows that the licence as originally granted and subsequently renewed stands in the name of the petitioner alone. By the subsequent endorsement on the licence the name of the respondent No. 5 has been added as a partner in the shop. The District Excise Officer has made a reference of the order of the District Magistrate, Kanpur. In nowhere it is mentioned that the respondent No. 5 would become a co-licensee, on account of addition of his name as a partner. A copy of the partnership deed has been filed along with the counter-affidavit. The learned counsel for the respondent No. 5 could not show from it that the respondent No. 5 has acquired any interest in the licence also. The licence granted to the petitioner remains the property of the petitioner and the respondent No. 5 was taken as a partner to run the business in pursuance of the licence granted to the petitioner.

9. To my mind the clause (f) of Rule 8 is only an enabling provision. It enables a licensee to run the business in partnership upon certain terms and conditions as mentioned therein after obtaining the licence in his individual name. The licensing authority may allow such person or persons to be taken as partners of the shop provided the terms and conditions of the said clause are fulfilled. It follows, therefore, that no right in the licence is created in favour of such person by taking such person as a partner. A right, if any, is created in favour of such person is qua the licensee under the Partnership Act and not in the licence.

10. It has to be noted that the entire licence fee for the year 2004-05 was deposited by the petitioner alone out of his own funds.

11. There is no pleading or evidence on behalf of the respondent No. 5 that the partnership fund was contributed towards the deposit of the licence fees. No material has been brought on record that the licence was treated as partnership property.

12. Under the Partnership Act, 1932, property brought by the partners or property acquired by the firm in the course of its business is in law considered the property of the partnership. A partner is entitled upon dissolution to a share in the accretions along with the property brought by him. This is recognised in Sections 14 and 15 of that Act. Section 14 reads as follows :

"14. The property of the firm.- Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm. or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.

Unless the contrary intention appears, property rights and interests in properly acquired with money belonging to the firm are deemed to have been acquired for the firm."

13. From a conjoint reading of Sections 14, 15, 22, 29, 30, 48 and 49 of the Partnership Act, 1932, it is clear that regardless of the character of the property brought in by the partners on the constitution of the partnership firm or that which is acquired in the course of business of the partnership, such property shall become the property of the firm and an individual partner shall only be entitled to his share of profits, if any, accruing to the partnership from the realisation of this property and upon dissolution of the partnership to a share in the money representing the value of the property. S.V. Chandra Pandian and Others Vs. S.V. Sivalinga Nadar and Others, ; Also see COMMISSIONER OF Income Tax Vs. GANGANAGAR FERTILIZER CORPORATION., .

14. The property of the firm is the "joint estate" of the partners as distinguished from the "separate estate" of partners. The expressions partnership property, partnership stock, partnership assets, joint stock and joint estate convey that property is owned by all the partners collectively and every partner is entitled, as

against all other partners, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights (Section 46 of that Act), Section 48 of that Act prescribes the mode of settlement of accounts of the firm after dissolution. What is meant by the share of a partner is his proportion of the partnership assets after they have all been realised and converted into money, and all the partnership debts and liabilities have been paid or discharged. After debts are paid the residue remaining of property is to be divided among the partners. No partner has a right to take any portion of the partnership property and assets that property is his property exclusively. No such right can be asserted either during the existence of the partnership or after its dissolution.

15. The respondent No. 5 has admittedly not deposited even a single shell towards the renewal of the licence fee for the current excise year. In equity also the respondent No. 5 does not deserve any sympathy. The learned counsel for the respondent has strongly placed reliance on paragraph 34 of the counter-affidavit in support of his arguments. The crux of the matter is that the respondent No. 5 has assumed that he has become co-licensee after depositing 1% of the licence fee of the shop. The argument cannot be accepted in view of the interpretation put upon clause (f) of Rule 8.

16. Para 34 of the counter-affidavit proceeds on an assumption that the such person who has paid 1% of the licence fee becomes co-licensee and there is no provision for deletion of his name in the licence. The induction of such person as a partner in the shop will not give him the status of the co-licensee for the reasons already mentioned above.

17. It may be noticed here that even the department in the impugned orders have not given the status of co-licensee to the respondent No. 5. The Excise Commissioner in the impugned order dated 22.3.2004 has mentioned only this much that the respondent No. 5 has acquired the right of a partner and in such situation unless and until the second party (respondent No. 5) also gives consent, it is not desirable to renew the licence for the excise year 2004-05 and as such the renewal should be made in the name of both the persons. He has also not held that the respondent No. 5 has become co-licensee. The State Government, the revisional authority, in the impugned order proceeded on the assumption and has failed to notice the distinction in between a co-licensee and a partner thus, admitted and it proceeded on assumption that once the original licensee has given his consent to take a partner in the shop. has no right to get the name of such person deleted at his sweet will. The State Government has directed that the licence may be renewed after taking the consent of both the licensees within a period of one week and in case of failure the shop may be settled in favour of the any other person.

18. The State Government has already realised the licence fee from the petitioner and is not going to suffer financial loss if the licence is renewed in favour of the petitioner alone. I see no Justification for refusal to renew the

licence in favour of the petitioner alone. The dispute if any between the petitioner and the respondent with regard to the business for the excise year 2003-2004 shall be settled by themselves in accordance with the law at the appropriate forum.

19. It may be placed on record that respondent No. 5 has not filed any proper application for renewal of the licence in his name also except creating hurdles in the way of the petitioner to see that licence is not renewed in favour of the petitioner alone. Respondent No. 5 has not parted with any sum to show to his bond fides and sincerity to get the licence removed in his name also.

20. In the result, the writ petition is allowed. The impugned orders dated 22.3.2004 and 22.4.2004 Annexures-4 and 6 are hereby quashed and the respondent Nos. 1 to 4 are directed by writ of mandamus to renew the licence of the petitioner of the foreign liquor shop at Jajmau, district Kanpur, forthwith, with costs.

