

(2000) 03 GAU CK 0058

In the Gauhati High Court

Case No : Writ Appeal No. 349 of 1999 in WP (C) No. 3400 of 1999

Runima Dutta

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-03-2000

Acts Referred:

Assam Excise Act, 1910 — Section 9
Assam Excise Rules, 1945 — Rule 206, 206(2), 223(2), 23
Constitution of India, 1950 — Article 226

Citation : (2000) 2 GLT 67

Hon'ble Judges : Brijesh Kumar, C.J; D.N. Chowdhury, J

Bench : Division Bench

Advocate : D.C. Mahanta, M. Singh and B. Buragohain, for the Appellant; C. Baruah and N.K. Baruah, for the Respondent

Final Decision : Allowed

Judgement

D.N. Chowdhury, J.—1. This appeal has arisen and is directed against the judgment and order dated 23.9.1999 passed by the learned Single Judge in WP(C) 3400/99 dismissing the writ petition preferred by the appellant in the following circumstances.

2. The Country Spirit Shop No. 1 at Hatilung, North Lakhimpur Sahar in the district of Lakhimpur was settled with the petitioner vide order dated 28.12.1998 of the respondent No.4 for a period of three years with effect from 1.4.1999 to 31.3.2002. Two of the discontented tenderers assailed the aforesaid settlement before the Assam Board or Revenue which were numbered and registered as Case No. 17E(L)/ 99 and 23E(L)/99. In the appeals the appellants questioned the financial soundness of the respondent as well as her claim for settlement as an educated unemployed youth within the meaning of Rule 23 of the Assam Excise Rules, 1945. The Assam Board of Revenue considered the affidavits, passbooks and the materials on record and found that the source of finance of the respondent No. 3 (appellant in Case No. 17E(L)/99) Shri Raj Shekhar Gogoi was

more genuine and more sound than that of the appellant (respondent No. 1 before the Board of Revenue) and that of the other appellant Shri Ranjit Doley. The Board while reaching the above conclusion took note of the tender more particularly the column 11 of the tender and held that the appellant did not indicate in the said claim about the source of finance and quantity of cash in hand, Bank balance etc. of her financier. According to the Board, the requirement of furnishing the particulars of column 11 were of mandatory nature. The Board finally held that finance of the respondent No. 3 was more genuine and more sound than that of the appellant and than that of the other appellant Shri Ranjit Doley. The Board also held that the appellant was not entitled for the preference under Rule 223(2) of the Excise Rules so much so that she should not be treated as an educated unemployed youth within the meaning of the Scheme, The Board accordingly allowed the appeal of the respondent No. 3 and set aside the settlement made in favour of the appellant and ordered for settlement of the CS Shop with the respondent No. 3. The appellant challenged the aforesaid judgment and order, of the learned Assam Board of Revenue by way of an application under Article 226 of the Constitution and the High Court on considering the respective claim of the parties dismissed the writ petition and upheld the judgment of the Board. Hence this appeal.

3. Mr. D.C. Mahanata, learned Sr. counsel appearing on behalf of the appellant/writ petitioner challenged the legality and validity of the order passed by the learned Single Judge as well as the order passed by the respondent No. 2 Assam Board of Revenue. Mr. Mahanta, learned senior counsel submitted that the learned Single Judge fell into serious error in not interfering in the decision making process of the Assam Board of Revenue. Mr. Mahanta, learned senior counsel submitted that the learned Assam Board of Revenue exceeded its jurisdiction and illegally set at naught the lawful decision of the local authority in settling the excise shop in favour of the appellant/writ petitioner. The Board, according to the learned counsel, took into the irrelevant consideration overlooking the relevant consideration which effect its ultimate decision and the learned Single Judge, on the face of the error apparent on the face of the record, dismissed the writ petition which caused great miscarriage of justice.

4. Mr. C. Baruah, learned Senior counsel appearing on behalf of the respondent No. 3 supported the decision of the learned Single Judge as well as the Assam Board of Revenue. Mr. Baruah, learned Senior counsel appearing on behalf of the respondent No. 3 submitted that the Board of Revenue is the highest authority pertaining to the settlement of liquor shops between the rival contenders. Referring to Section 9 of the Assam Excise Act, 1910 Mr. Baruah submitted that the power of the Board as the appellant authority is of wide nature. The scope and ambit of the power conferred on the Board is not to be confined and constricted. The Board as being the appellant authority can assess and appreciate the evidence and reach its own conclusion and make its own choice from the rival contenders like that of a primary authority. Mr. Baruah, learned Senior counsel submitted that the Board lawfully considered all the aspect of the

matter and after assessing the rival claims found the respondent No. 3 to be the suitable. The Board as the appellant authority did not find the appellant/petitioner to be the suitable person for settlement on evaluation of all the aspect of the matter. The Board reached its own conclusion on assessment of the evidence and materials on record and the finding of fact reached by the Board is final and conclusive and, therefore, the learned Single Judge rightly refused to interfere on the conclusion of fact reached by the Board. Mr. Baruah, learned Senior counsel in support of his contention referred to the decisions in *Mukunda Bore Vs. Bangshidhar Buragohain and Others*, . *Bishnu Ram Borah and Another Vs. Parag Saikia and Others*, *Rajkumar Dilip Narayan Sinha v. Assam Board of Revenue and Ors.* reported in ILR 1980 Gau 99 and *Jogananda Pegu v. Assam Board of Revenue and Ors.* reported in 1982(1)GLR 563.

5. In this case the primary authority, from amongst the tenderers, found the appellant as the most suitable. Under the law the District Collector is the authority to make settlement of excise shop in consultation with an Advisory Committee. The Act/Rules as well as the Executive Instructions prescribe a detailed methodology for selection of some tenderer after conducting a due enquiry. The settling authority on its own assessment found the appellant as the most suitable. The settling authority took note of the enquiry report submitted by the departmental authority against all the contending tenderers. The report contains the materials in support of the financial capability. Under the practice as indicated in Rule 104 of the Executive Instructions the tenders are to be presented personally by the tenderers and received by the Collector/Superintendent of Excise at Sadar and by the Sub-Divisional Officer or the Senior Extra Assistant Commissioner in the Sub-Division. The officer receiving the tenders is in a position to collect at least some particulars of the tender putting questions directly to the tenderers. The local authority was fully satisfied with the credentials and financial capacity of the appellant. The Board set aside the order of settlement and found the respondent No. 3 to be more genuine and more sound than that of the appellant. The Board also found the source of finance of the appellant not reliable in view of the contentions of the appellant that the security deposit etc. were being paid by her by money provided to her by backdoor financier and not from disclosed source of finance. The Board also did not accept the appellant as an educated unemployed youth within the meaning of Rule 223(2) of the Assam Excise Rules, 1945. In reaching the conclusion in the first assessment as to the financial capability the Board was of the view that the tender of the appellant did not contain the necessary particulars as required under column 11 of the tender. The column 11 of the tender reads as follows:-

"11. Whether the tenderer is capable of financing his business himself. Give details of source, cash in hand. Bank balance, Security, assets etc."

The appellant answered that column in the following words:-

"Yes. I am financially capable enough to run the business. I shall get financial assistance in this respect from my father and also from my sister and sister"s

husband. They will render financial assistance from their Bank balance. Affidavit in this regard will be produced during enquiry before settlement."

6. The Assam Board of Revenue found fault with this entry of the appellant. The Board dealt with this aspect of the matter in the following manner: -

"There is no mention about the source of finance and the quantity "of cash in hand, Bank balance etc. of the financiers of the respondent No. 1 in Col.-11 of her tender though the same is mandatory as per the said Col.-11. The respondent No. 1 has also not submitted any affidavit sworn by her to that effect alongwith her tender. The respondent No. 1 has simply stated against that column that affidavit in that regard will be produced during enquiry before settlement. But there is no such provision in the Col.-11 of the tender that the source of finance and the quantity of finance assured can be informed at the time of enquiry before settlement. As per the Rule 206(2) of the Assam Excise Rules, 1945 the tender must be in such form and contain such particulars as may be prescribed by the State Government and tender not containing all the particulars shall be liable to be rejected. The contention of both the appellants that the tender of the respondent No. 1 shall have to be rejected outright by the settling authority as respondent No. 1 has not furnished the required particulars In Col.-11 of her tender which are mandatory as per the Rule 206(2) of the Assam Excise Rules, 1945 has, therefore, sufficient force."

7. The Board while deciding the aforesaid issue gave extravagant emphasis on the entry in Col.-11. One of the objects of receiving tender is to acquire and collate information of particulars about the tenderer. One such particulars are gathered by the concerned officer at the time of receiving the tender which empowered and authorised concerned officer/officers to collect at least some particulars about the tender by putting direct questions to the tenderer. The information received are to be noted down on the tender. Such information helps the authority in making further enquiry and in some cases even obviate the necessity of further enquiry. All the tenders are to be considered save and except the tenders received from the persons in the debarred list or from foreigners, not domicile in the State. All other tenders are to be considered by the Committee. Rule 206(2) enjoins that "the tenders must be in such form and contain such particulars as may be prescribed by the State Government, tenders not containing all the particulars shall be liable to be rejected". The use of the language "must" and "shall be liable" does not make a rule mandatory. The provision is directory in contention. On this issue this course is consistent. Reference Dinesh Chandra Dowerah and Another Vs. A.M. Dam and Others, *Kemprai v. Assam Board of Revenue* AIR 1970 A&N 224 (FB) and a Special Bench decision in *Rajkumar Dilip Narayan Singha* (supra). In all the cases the court held that the filling up of Col.-11 is directory in nature and a tenderer can put to use or utilise sources beyond that one indicated in Col.-11. The appellant in Col.-11 in clear terms indicated that she relied on the financial assistance from her father and also her sister and sister's husband. As per the communication

bearing No.LEX.26/99/19 dated 25th May, 99 sent by the Deputy Commissioner, Lakhimpur, to the Assam Board of Revenue in reply to the communication of the Board under Memo. No. ABR 17E(L)/99/1 dtd 7.5.1999 the appellant produced the affidavits and other relevant documents before the enquiry officer in support of her financial capability. The necessary enquiry report in original was submitted to the Board in connection with case No. 23E(L)/99 vide letter No. LEX. 18/99/15 dtd 23.3.1999. The Deputy Commissioner by the aforesaid memo indicated that the settling authority was satisfied as to the genuineness and adequacy of the financial capability of the appellant. The settling authority further informed that the father of the appellant was a carrier of the Bihpuria Country Spirit Shop at Harmuty which under no circumstances can be treated as disqualification in the matter of settlement of CS shop. The settling authority in his report reiterated that the source of finance of the appellant was genuine and adequate and, therefore, the authority lawfully settled the shop in her favour. The report also ruled out about any evidence that the security money was provided by backdoor financier. The settling authority acted with the advice of the Advisory Board duly constituted under the law and found the appellant more suitable and accordingly settled the shop with her. The learned Board of Revenue did not address its mind to the report of the Inspector as well as the communication sent by the Deputy Commissioner. The report of the Deputy Commissioner who happened to be the head of administration of the District and is/was fully acquainted and conversant with local situation who is/was statutorily responsible for the settlement, was totally disregarded by the learned Board of Revenue. The Board no less was armed with the appellant power and as such is the highest authority for deciding the question of settlement of liquor shop between the rival claimants. The power of the Board is no doubt co-extensive with the settling authority but at the same time the Board cannot totally be oblivious of reasoning and considerations that weighed upon the settling authority but to give due weight to the decision making process of the primary authority. The Board here, instead wholly overlooked the decision making process of the settling authority on the other hand it itself embarked upon the exercise of settlement. The Board failed to defer the opinion of the settling authority without any reason whatsoever. The Board overlooked the fundamental principles of law that on an appeal from the decision of the original authority the presumption is that the decision against which the appeal is preferred is right. The burden is always on the appellant to show that the original authority acted illegally or on wrong principles of law. The selection made by the local authority, namely, the District Collector/Sub- Divisional Officer ought to have been given the due weight on the consideration that these authority possessed enormous scope and opportunity to know the local condition as well as the functioning and business of the inhabitants of the local area and/or district/region. As indicated above . the Board in this case took the role of the settling authority, disregarding of the judgment of the primary authority and embarked upon the exercise to assess the comparative merits of the financial superiority of tenderers and held that the source of finance of the respondent No. 3 was more genuine and more sound than that of the appellant and the other

appellant before the Board. There is no rustle or undertone in the judgment of the Board to the effect that the source of finance mentioned and relied by the appellant is/was besmirched and/or blemished or that it lacked authenticity or legitimacy. The fact of the matter is that there is no pronouncement from the Board that the source of finance relied upon by the appellant was stained or in way tarnished or that the settlement in favour of the appellant suffered from any infirmity. The Finding of the Board of Revenue to the extent of genuineness of source of her finance from which security deposit was made at the time of settlement that "the contention of both the appellant's that security deposit etc. are being paid by the respondent No. 1 with money provided to her by the backdoor financier and not from disclosed source of finance, has therefore sufficient force" is mere ipse dixit of the Board. The Board did not dispute the financial capability of Dimbeswar Dutta, father of the appellant as well as Rabin Baruah, brother in law of the appellant. The Board only observed that the genuineness of bank account of Dutta and Barua regarding the exact date of opening of mode of transaction could not be verified due to non-submission of the original passbooks of the said accounts of the financiers of the respondent No. 1. If the Board had the misgiving on the materials or copies of the statement of accounts, Board could have called upon the appellant as well as the bank or banks to produce further proof to allay its doubt. The reasoning of the Board as to the entitlement of the appellant for preference under Rule 223(2) of the Assam Excise Rules also cannot be upheld. The Board held that the appellant was not an educated unemployed youth under Rule 223(2) of the Assam Excise Rules. Rule 223(2) of the Assam Excise Rules alongwith the note appended thereto are reproduced below:-

"223(2) In making settlement to any person preference shall always be given to the educated unemployed youths or to co-operatives and co-operative firms formed by such educated unemployed youth. Preference shall also be given to the person belonging to the more backward community of the other Backward classes."

"Note. The term "educated unemployed youth" as mentioned in Sub-rule (2) of Rule 223 means a person not exceeding 35 years of age who has passed the HSLC or its equivalent examination and is without any employment."

8. Educated unemployed youth as explained in the note is to be a youth not exceeding 35 years of age who has passed HSLC or equivalent examination and is without any employment. The appellant on the date of settlement was of 23 years 15 days as per the certificate dated 16.11.1998. She appeared in the TDC final examination in the year 1998 but could not come out successful. The Board held that the appellant was a regular student without any break till 1999. The Board held, however, that the appellant appeared in the final examination in the year 1999 and therefore she was prosecuting her studies without break till 1999, that is, after the date of settlement. The Board referred to the report: of the Deputy Commissioner, Lakhimpur vide; memo No.LEX.26/99/42/ 171 dated

5.7.99 alongwith the certificate issued by the Principal, Lakhimpur Girls" College where she read. The certificate dated 5.7.1999 is reproduced below:-

" Dated - 05/07/99

TO WHOM IT MAY CONCERN

" This is to certify that Miss Runima Dutta, daughter of Sri Dimbeswar Dutta, an inhabitant of Vill. Padumoni Khat Gaon, P.O. Bahadur Chuk, North Lakhimpur was a regular student of TDC 1st year class during 1995-96. In 1996-97 she was a student of TDC 2nd year and in 1997-98 was a student of TDC 3rd year class of this college upto month of May 1998. She appeared in the TDC final examination in 1998 in the month of June as regular student but could not come out successfully. Again she appeared in the same examination in 1999 from this college as female non-collegiate candidate. The result of which is not yet declared by D.U. Her Part II Roll No. is 1399/A-157. Miss Runima Dutta prosecute her studies in Lakhimpur Girls" College as regular student upto June 1998.

As such she is not a regular student of this college during 1998-99.

Sd/- illegible, For Principal, Lakhimpur Girls" College, North Lakhimpur.

9. The Extra Assistant Commissioner in his report dated 5.7.1999 to the Deputy Commissioner, Lakhimpur informed that he examined the relevant records of the Lakhimpur Girls" College of candidates for TDC final examination under Dibrugarh University. On examination he found that in the Roll sheet No.S-2 TD(B) was the name of Smti Runima Dutta at SI.No.157 in category (F.N.) means female non-collegiate. He reported that as per the records of the college she was not a regular student of Lakhimpur Girls" College though she appeared in the TDC Part II examination under Dibrugarh University held in March, 1999 as an FN (Female non-collegiate) candidate from Lakhimpur Girls" College. As per the report she was a regular student of the Lakhimpur Girls" College upto 1998. The certificate as well as the report clearly indicates that the appellant was a regular student upto June, 1998. Since she could not succeed she appeared again in Part II examination under Dibrugarh University in March, 1999. Appearing in examination as a non-collegiate student to get a degree per se does not make her a student. The Board referred to Bishnu Ram Borah and Another Vs. Parag Saikia and Others, The said decision is not applicable in this case. In the above case the respondent No. 2 Prafulla Barua was a student of BSc class who was still undergoing his studies. In the circumstances the Supreme Court held that a student who was still undergoing studies cannot be regarded as having completed his education or an unemployed youth. In the instant case there was no evidence on record that the appellant was pursuing her course of studies in the college after June, 1998. The learned Board fell into error in reaching the aforesaid conclusion in the absence of any materials on record. The conclusion reached by the Board in this regard is based on assumptions and presumptions.

10. From the discussions made above it thus emerges that the learned Board of Revenue in setting aside the settlement in favour of the appellant took into consideration irrelevant considerations overlooking relevant considerations which affected its decision making process that lead the Board to set aside the settlement in favour of the appellant. The judgment of the Board to the effect that Rule 206 and Col.-11 of the tender notice is mandatory is an error apparent on the face of the record. As mentioned above the Board did not find that the source of finance of the appellant was not genuine. What it found was that the finance of the respondent No.3 was more genuine and more sound than that of the respondent No. 1. The Board did not hold that the reasoning in support of the settlement given by the original settlement or settling authority was unlawful", perverse or unjustified. Similarly the finding of the learned Board of Revenue that appellant was not entitled for the protection of Rule 223(2) suffers from the vice of perversity. A decision which is perverted is unsustainable.

11. The power under Article 226 of the Constitution of India is supervisory in nature. In exercise of such power a finding/conclusion of an inferior Tribunal can be interfered with if the High Court found that on arriving at the conclusion the Tribunal has failed to consider some materials or has considered some extraneous and irrelevant materials or that the finding is based on no evidence or that the finding is such that no reasonable person properly instructed in law could come to such conclusion on the basis of which finding has been arrived at. The power reposed on the High Court under Article 226 does not and admit any limitation on the power of the High Court for the exercise of such jurisdiction. In *Dwarkanath v. Income Tax Officer, Special Circle* the Supreme Court in clear terms expressed that the Article 226 is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and, the person or authority against whom it can be exercised. But this does not mean that the High Court can function arbitrarily under this Article. The view is also reiterated by the Supreme Court in *Mewa Singh and Others Vs. Shiromani Gurdwara Prabandhak Committee*, The issue before the High Court is as to whether the learned Board is/was justified in setting aside the order of settlement. The reasoning of the Board is already mentioned. The Board did not find the appellant petitioner as a financially unsound. Only it has held that the source of finance of the appellant (respondent No. 3 here in) was -more genuine and more sound than that of the respondent No. 1 and that the other appellant Shri Ranjit Doley. The finding of the learned Board to the effect that her source of finance was not reliable is based on no evidence. It is true that High Court in exercise special jurisdiction does not act as a court of appeal. But it can interfere when there is jurisdictional error apparent on the face of the record committed by the Tribunal . In the instant case there was no positive finding of the Board that the appellant did not possess the necessary financial capacity. The Board also committed error of law in interpreting Rule 206 read with Col.-11 of the tender. The finding of the Board

as regards the entitlement of the preference of the petitioner also suffers from the vices of non-application of mind. The Principal of the Constitution clearly mentioned in the certificate that the appellant was a regular student upto June, 1998. She was not a "regular student of the college during 1998-99. The Board did not disbelieve the statement of the Principal to that effect nor there was any scope or material for the Board to reach a contrary conclusion. The Board as the Appellant Authority is entrusted to act judicially. Every judicial or quasi judicial decision is required to record its reasons, unless the same is expressly or impliedly dispensed with by the statute. Giving of reasons is insisted to ensure justice and fair play and to avoid arbitrariness.

12. Article 226 of the Constitution entrusted upon the High Court to issue writs, directions or orders in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warranto and Certiorari (a) for the enforcement of rights conferred by Part III of the Constitution and; (b) for any other purposes. The object of writ or certiorari is to keep the exercise of powers by the inferior authorities etc. within the limits of the jurisdiction assigned to them by law and to restrain from acting in excess of their authority. The Article entrusted on the High Court with the responsibility of supervisory jurisdiction to ensure that the inferior authorities act within the limits of the jurisdiction set out by law.

13. In the preceding paragraph it was already pointed out that the findings of the learned Board of Revenue as to the financial soundness is patently illegal and perverse. Finding not supported by evidence and is based on no evidence is regarded as a species of error of law *Syed Yakoob Vs. K.S. Radhakrishnan and Others, and Babhutmal Raichand Oswal v. Laxmibai R. Tarte and Anr. AIR 1975 SC 1297* . Similarly, the finding and Conclusion reached by the learned Board of Revenue to the effect that the appellant was not an educated unemployed youth is contrary to the evidence on record. With utmost respect to the learned Single Judge, we are constrained to record that the learned Single Judge missed the point and enmeshed itself to considerations other than the relevant considerations that affected the decision making process. The learned Single Judge, in our view, was not justified In dismissing the writ application on the face of the glaring error committed by the learned Board of Revenue.

14. In view of the findings and observations made above the appeal is allowed. The judgment and order of the learned Single Judge as well as the Board is set aside and the writ petition is allowed.