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In the Calcutta High Court

Case No : Civil Rule No. 3626 of 1971

Samarendrajit Shaw APPELLANT

Vs

The Collector of Excise, Calcutta and Others RESPONDENT

Date of Decision : 05-07-1976

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : AIR 1977 Cal 221 : (1977) CriLJ 178

Hon'ble Judges : Nirmal Chandra Mukherji, J;Bankim Chandra Ray, J

Bench : Division Bench

Advocate : Manjula Bose and Kalyanbrata Roy, for the Appellant; Bhabani Shankar Bagchi and Archana Sengupta, for the Respondent

Judgement

B.C. Ray, J.—This is an application under Art. 227 of the Constitution of India and it is directed against the order No. 648 R. E. dated 25th of October, 1971 passed by the Collector of Excise, Calcutta as well 3s against the show cause notice dated 24th December 1970 issued by the Collector of Excise, Calcutta in Misc. Case No. 61 (F. L.) of 1970-71.

2. The petitioner is the proprietor of foreign liquor ''off'' shop under the name and style of M. L. Shaw and Co. at 15, Ashutosh Mukherjee Road, Bhowanipore, Calcutta and the petitioner has been running the said business under licence granted, by the Collector of Excise, Calcutta, the respondent No. 1 from year to year for more than 43 years. The petitioner furnished a security deposit of more than Rs. 10,000/- in cash including a lump fee of Rs. 300/- for the year 1971-72 in the Calcutta Collectorate Treasury in favour of the Excise Department for the E. L. ''off'' licence for the said shop. On November 23, 1970, the respondent No. 2, Utpal Chakraborti. the then Inspector of Excise, Bhowanipore range, inspected his shop at about 2.20 P. M. At that time the salesman Mathurmohon Shaw wag alone present in the said shop. On the demand of the Inspector the said salesman handed over to him the Inspection Report Book as well as Excise Daily Account Book. The Inspector after going through the daily Account Book

enquired of him as to why the sale of liquor of 21st and 22nd of November, 1970 were not entered in the said Daily Account Book whereon the salesman Mathurmohan Shaw intimated him that Pradip Kumar Dey who was incharge of transferring the sale figures of liquor bottles in the daily Excise Account Book from the daily Excise Ledger Book of the excise shop disappeared suddenly from the shop after closing the daily Account Book on 20-11-1970. The said salesman also stated that on 22nd November, 1970, the said salesman Pradip Kumar Dey sent a letter to the petitioner in the evening intimating that he had to leave the shop without informing anybody as he was frightened by some antisocial people on the night of 20th November. 1970 as he refused to Rive them liquor bottles without payment of the price for the same. The Inspector, therefore, asked the salesman to produce the daily Excise Ledger Book and daily Excise Stock Book of the shop and he accordingly handed over the same to him. The petitioner was not present in the shop at the time. The Inspector, the respondent No. 2, looked into the last entries of sales of liquors as well as of receipts in the daily Excise Ledger Book and also daily Excise Stock Book of the shop which were made up-to-date.

3. The Inspector, thereafter, directed the salesman Mathur Mohan Shaw to show arid count the liquor bottles (whisky in the Altnirah) and the salesman began to count the same. But all of a sudden it was stopped by the Inspector who asked him to open the lock of the collapsible gate of the godown in the shop room. The salesman opened the godown and started showing him the bottles lying in the case of whisky. The Inspector, however, asked the salesman that his help was not required in the counting of bottles there in the godown and directed him to send the cooli-bearer in the godown. The salesman followed the bearer inside the godown and reminded the Inspector that the responsibility of showing and counting of the stock of liquors to him lay on the salesman and as such the salesman should be allowed to be present at the time of counting the stock of liquor bottles, but, unfortunately the Inspector refused to allow him to be there and asked him to go out. The salesman then told the Inspector that he would report the matter to the licensee and would call him over the phone but the Inspector told him that there was no necessity of informing the licensee. The salesman, however, told the petitioner aver the phone about this. Subsequently, Dipendra Lal Shaw, the Sales Manager of the said shop also came and requested the Inspector to permit him to be present to help him to count the liquor bottles but the said request was turned down by the Inspector. The petitioner, thereafter, came to the shop and found the Salesman as well as the Sales Manager standing outside the godown as they were prevented from entering into the godown for counting and verifying the stock of liquors. On the direction of the petitioner the salesman and the Sales Manager counted the stock of liquors (whisky) and found that the same tallied with the stock of liquors as entered in the daily Excise Ledger Book and Excise Stock Book of the shop. The petitioner''s son Dipendra Lal Shaw then challenged the incorrect recording of figures by the Inspector and requested him to recount and verify the stock of whisky bottles in their presence.

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The Inspector Sri Utpal Chakraborti, however, declined to recount the stock of liquors or to verify his counting of liquor bottles as recorded by him, The Inspector hurriedly completed the writing of the Inspection Report on the Inspection Book and asked the petitioner to sign the Report Book for the alleged irregularities. The petitioner, therefore, expressed his inability to sign. On the basis of the said inspection report the Misc. Case No. 61 (F. L.) of 1970-71 was started and the petitioner was served with a notice No. 163 (F. L.) dated 24th of December, 1970 asking the petitioner to show cause within seven days of the receipt of this notice to explain as to why his licence would not be cancelled or action otherwise would not be taken against him for the irregularities mentioned therein as he violated the condition No. 15 of the licence. This notice has been marked as Annex. D to the petition.

4. It has been stated that the salesman Mathuramohon Shaw wrote a petition dated 3rd December, 1970, addressed to the Collector of Excise describing the incidence that occurred at the time of inspection by the Inspector of Excise on 23rd of November, 1''970. The petitioner also stated that in the Excise daily Ledger Book liquors that have been purchased from licensed dealers under excise pass and challans have been entered and the liquors that are sold to the public under cash memos after closing of all transactions of the day are also entered in the said Ledger Book of the shop. It is from the entries of the Excise Daily Ledger Book the figures are posted in the Excise Daily Account Book. The said Excise Daily Ledger Book and the Excise Daily Stock Book and cash memos were handed over to the Excise Inspector, the respondent No. 2 and as such there was no difficulty for him to verify the actual stock of whisky in the godown. The petitioner has also stated that he submitted monthly statements for the month of November, 1970 in the Office of the Collector of Excise on 7-12-1970 and the same was duly acknowledged by the Office. On December 16, 1970, the Inspecting Officer visited the shop and checked the daily Account Book and found the same as correct. It has also been stated that the self-same inspecting Officer also visited the shop on 24th December, 1970 and looked into the daily Account Book and no discrepancy could be found out in the stock balance of ''India-made'' whisky. It has been submitted that in view of the said monthly statements being found correct the litterage fee being accepted on its basis the impugned cases as well as the impugned show-cause notice ought not to have been started against the petitioner and the same are liable to be set aside.

5. On the 16th of December, 1971, the instant Rule issued but no interim order was passed. The petitioner was given liberty to move for interim order after serving notice of the application on the opposite parties. On December 20, 1971'', an order of interim injunction was made restraining the Collector of Excise, the opposite party No. 1 from proceeding with the show-cause notice till the disposal of the rule. It was also ordered that the Collector the respondent No. 1 will be at liberty to extend the excise licence for such period as he might, think fit.

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6. An affidavit-in-opposition sworn on 27th June, 1972 by Sri Debesh Chandra Sengupta, Collector of Excise, Calcutta has been filed. It has been stated that the Inspector of Excise, Sri Utpal Chakra-borti on November 23, 1970, checked the physical stock of India-made whisky with the book balance of the prescribed Account Book namely daily Account Book and found discrepancies in the stock as noted in his inspection report. On the basis of the said inspection report the Collector of Excise, Calcutta drew up a miscellaneous proceeding being case No. 61 (F. L.) of 1970-71 and asked the licensee by memo No. 163 (F. L.) dated 24-12-1970 to show cause why his licence should not be cancelled. The petitioner without giving any explanation to the said show-cause notice moved this application. It was also averred that the stock of whisky on counting did not tally with the stock as entered in the daily Excise Account Book. It has been submitted that the said misc. case was not started mala fide by the Collector nor the Collector acted in excess of his jurisdiction in starting the said misc. case. It has also been averred that the petitioner''s licence has been renewed from time to time.

7. An affidavit-in-opposition sworn by Sri Utpal Chakraborti, the Inspector of Excise, Bhowanipore range, the respondent No. 2 was also filed. It has been stated that on 23-11-1970 he inspected the shop in question from 2-20 p. m. to 4-30 p.m. and after counting the physical stock of India made whisky thrice he was sure about the discrepancy in the stock that was shown in the daily Excise Account Book. He denied that ''be abused the petitioner''s salesman Mathuramohon Shaw nor did he prevent him to be present in the godown at the time of counting the said stock of liquors.

8. An affidavit-in-reply sworn by the petitioner reiterating the statements and allegations made in the petition have been filed on behalf of the petitioner. A supplementary affidavit has been filed on behalf of the petitioner on 22nd August, 1972. It has been stated that the Inspection Reports in respect of the shop made by Sri S. Biswas. the Inspector of Excise, Foreign Liquor (G) dated 10-6-1972 and 11-7-1972 are necessary to be considered for the decision of this case and the said reports be considered for the decision of this case and the said reports have been annexed as Annexe. A-2 and A-3 respectively to the supplementary affidavit.

9. Mr. Kalyanbrata Roy, learned Advocate appearing on behalf of the petitioner has submitted that the inspection report submitted by the Inspector of Excise, the respondent No. 2, is wholly mala fide and bad inasmuch as the Inspector did not at all consider the daily Excise Ledger Book and the daily Excise Stock Book where the stock that was left after closing of the transactions on 21-11-1970 and 22-11-1970 had been correctly entered. The said books were handed over to the Excise Inspector but he though considered the same did not refer to them and the alleged discrepancies in stock was found by him in his inspection report on the basis of the excise Account, in which the entries after closing of the transactions on 21-11-1970 and 43-11-1970 had net been entered.

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10. Mrs. Manjula Bose, learned Advocate appearing subsequently on behalf of the petitioner has contended vehemently that in the shop the daily sales and purchases are entered in the daily Excise Ledger Book and the stock that remains after the closing of the sale is entered in the daily stock book. In the daily Excise Account Book the figures are entered from the daily Excise Ledger Book and from the daily Stock Book. The said Books were handed over to the Inspector of Excise who could have easily verified the actual stock position after closing of all transactions of the said two days i. e. on 21-11-1970 and 22-11-1970 from the two books and the Inspector could have verified the actual stock as entered in the said daily Excise Ledger Book and the daily Stock Book as the daily Account Book was not written up-to-date. It has also been submitted that in view of the fact that in the daily Excise Ledger Book and the daily Stock Book entries made of all the transactions that took place on the said dates and the stock that remained at the close of the transactions the respondent No. 2 ought to have verified the stock with reference to the said two books. As such there has been no violation of the terms and conditions of the licence. Moreover, sufficient explanation has been given as to why the figures could not be posted in the daily Account Book on 21-11-1970 and 22-11-1970. It has next been contended that the monthly statement of November, 1970 was submitted on 7th Dec., 1970 and the said monthly statement was checked by the Inspector of Excise, Foreign Liquor (G) on 10-6-1972 and the Inspector found the statement to be in order and litterage fee on the basis of the said monthly statement was also accepted. As such it has been contended that there is no discrepancy in the stock of India-made whisky and so the proceeding in question is a mala fide one and the same is biased and without jurisdiction. The said proceeding as well as the impugned notices are liable to be set aside.

11. It has also been submitted that the impugned proceeding is also bad inasmuch as there has been no violation of condition No. 15 of the licence. It has been submitted that the petitioner produced his licence and also produced the daily excise Ledger Book and daily Excise Stock Book as well as the cash memo which will clearly show the correct account of the sale of liquor and the position of the stock after such sale. The petitioner also produced the daily Excise Account Book and explained the reason for not posting the figures in the Daily Account Book on 21-11-1970 and 22-11-1970.

12. Mr. Bhabani Shankar Bagchi, learned Advocate for the respondent has urged that the Collector has power to initiate proceeding for breach of the terms and conditions of the licence. In this case Mr. Bagchi submitted that the impugned proceeding has been started on the basis of the Inspector''s report and notice was issued directing the petitioner to show cause against the charges mentioned in the said notice. The petitioner without submitting any explanation has challenged the said notice in this application, This application, Mr. Bagchi submitted, is premature and should be dismissed inasmuch as the proceeding started by the Collector is not without jurisdiction. It has also been submitted that whether the report of the Inspector is biased or not and whether the

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petitioner has violated the terms of the licence or not can be decided only after the petitioner submits his explanation and after the petitioner is heard.

13. It appears that the petitioner in this application has challenged the validity of the proceeding started by the Collector as well as the issue of the notice directing the petitioner to show cause on the charges mentioned in the notice as to why the licence should not be cancelled. The petitioner has challenged the said notice on the main ground that the proceeding was arbitrary and mala fide and as such the same should be set aside. The petitioner does not dispute that the Collector has got jurisdiction to initiate proceeding for breach of the terms and conditions of the licence and as such the instant proceeding is not per se without jurisdiction. The only challenge to the initiation of the said proceeding is that the report of Excise Inspector on the basis of which the impugned proceeding has been initiated is a biased and mala fide one inasmuch as there was no discrepancy as regards the stock of India-made whisky after the close of sale on 21-11-1970 and 22-11-1970 as the monthly statement of November was accepted as correct. To decide this question it is necessary to consider the scope of the provisions of Article 227 of the Constitution. In Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee, it has been held that power of superintendence is to be exercised only to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. The said decision was relied upon in Waryam Singh and Another Vs. Amarnath and Another, . In AIR 1975 1297 (SC) it has been observed by the Supreme Court that the jurisdiction of the High Court under Article 227 is limited only to seeing that the subordinate court functions within the limits of its authority and does not extend to correction of mere error of fact by examining the evidence and reappreciating it. An error of fact, even though apparent on the face of the record is not subject to correction by the High Court in exercise of its jurisdiction under Article 227. An error of fact can be corrected only by a superior court in exercise of its statutory power as a court of appeal. The High Court cannot in guise of its exercising jurisdiction under Article 227 convert itself into a court of appeal when the Legislature has not conferred a right of appeal and made the decision of the subordinate court or tribunal final on facts.

14. In Durg Transport Co. Private Ltd. Vs. Regional Transport Authority and Others, the petitioner company applied for renewal of its stage carriage permits in three different routes before the Regional Transport Authority, Raipur and Janata Motor Transport Co-operative Society Ltd., Durg also applied for grant of fresh permits in the said three routes in lieu of permits held by the petitioner. The R. T. A. refused to renew the permits of the petitioner and granted permits to the said co-operative society in respect of two of the said three routes and directed for inviting applications for permit in respect of the third route. Against the said order appeals were filed before the State Transport Appellate Authority and application for an interim stay of operation of the order granting permits to the respondent Society for two routes and the invitation of fresh applications for third route. The appellate authority stayed the operation of the order inviting

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application for the third route but it rejected the prayer for interim stay of operation of the order granting permits to respondent Society. Against the said order an application under Article 227 of the Constitution was filed. It has been held that the Appellate Authority is undoubtedly vested with the discretion whether to grant stay or make any interim order in an appeal pending before it. But the discretion has to be exercised according to settled legal principles and not contrary to them. The Appellate Authority in making the impugned order approached the matter in an arbitrary manner and against all legal principles and as such the said order can be quashed on a petition under Article 227 of the Constitution. It has also been observed relying on the decision in Waryam Singh and Another Vs. Amarnath and Another, that the power of superintendence is not restricted to cases of non-exercise or illegal exercise of jurisdiction but extends also to cases where there has been a miscarriage of justice occasioned by errors of law or procedure which cannot be corrected otherwise. This decision does not apply to this case.

15. In this case only a show-cause notice has been issued to the petitioner. The petitioner has not submitted his explanation and the case has not yet been heard and no decision has been arrived at by the Collector of Excise. As such, there is no room for any interference by this Court under its power of superintendence. Moreover, as we have already pointed out that the impugned proceeding which has been started by the Collector on the report of the Inspector is not per se without jurisdiction. The petitioner has been given opportunity of showing cause against charges mentioned in the said notice. The petitioner can state his objections against the said proceeding. If the Collector of Excise after hearing holds against the petitioner there is provision for appeal before the Excise Commissioner and a further appeal to the Board of Revenue. Moreover, if the Collector of Excise approached in an arbitrary manner and if he does not consider all the relevant materials that will be produced by the petitioner before him in deciding the said misc. case and if his decision be biased then the petitioner can challenge the same on an application under Article 227 of the Constitution.

16. It has been strenuously urged by the learned Advocate for the appellant that the entries regarding sales and purchases of liquor of every day including 21-11-1970 have been duly made in the daily excise Ledger Book and daily Stock Book from where the figures are noted in the daily Excise Account Book. The transactions in respect of the said dates were not entered as Pradip Kumar Dey, the salesman disappeared from the shop after writing the Daily Excise Account Book on the night of 20-11-1970 without leaving any intimation to the petitioner or to the other employees of the shop. It was only in the evening of 22-11-1970 that he intimated about his unwillingness to work in the shop any longer by his letter to the petitioner and as such in the daily excise Account Book the entries in respect of transactions of the said two dates have not been made. It has also been submitted that the cash memos were produced before the Excise Inspector, the respondent No. 2, and from the same the sales of liquor on the said two dates would be evident.

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17. The Inspector ought to have considered the said cash memos as well as the daily Excise Ledger Book and daily excise Stock Book and it would have revealed that there was no discrepancy regarding the stock of liquor (India-made whisky) on 23-11-1970. It was also submitted that the petitioner submitted monthly return of November, 1970 on 7-12-1970 and litterage fee was accepted on its basis by the respondents. The said return was duly checked by the Inspector of Excise, Foreign Liquor (G) on 10-6-1972 as will be evident from the inspection report and there was no discrepancy regarding stock of India-made whisky. So the charges are baseless. We have already held that the Collector of Excise had jurisdiction to start the misc. case on the basis of the Inspector''s report which disclosed that there has been a breach of term No. 15 of the excise licence. Now whether there has been no violation of the said term and misc. case shall be dropped is a matter to be decided by the Collector after considering the causes shown by the petitioner and after hearing him. It is neither proper nor expedient and just to express any opinion on the merits of the said misc. case.

18. In the premises aforesaid all the contentions raised on behalf of the petitioner having failed the Rule is discharged. All interim orders are vacated. There will be no order as to costs in the circumstances of the case. Let the operation of the order be stayed for a period of six weeks.

N.C. Mukherji, J.

19. I agree.

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