(2005) 06 CAL CK 0033

In the Calcutta High Court

Case No : F.M.A. No. 2372 of 2004

Sangita Jalan APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 13-06-2005

Acts Referred:

Bengal Excise Act, 1909 — Section 30, 31, 36, 37, 37A
Calcutta Municipal Corporation Act, 1980 — Section 399
West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain other Intoxicants) Rules, 2003 — Rule 8, 8(1)

Citation : (2006) 1 CHN 644

Hon'ble Judges : Tapan Kumar Dutt, J;Asok Kumar Ganguly, J

Bench : Division Bench

Advocate : Moloy Kumar Basu and Nanda Lal Nayak, for the Appellant;Jyotirmoy Guha, Suparna Biswas, S. Mukherjee and Jayanta Kar, for the Respondent

Final Decision : Dismissed

Judgement

Asok Kumar Ganguly, J.—This appeal is directed against a judgment and order dated 02.09.2004 passed by a learned Judge of the Writ Court by which the learned Judge was pleased to dispose of the two writ petitions being W.P. No. 10120 (W) of 2004 filed by the appellant and another writ petition being W.P. No. 8269 (W) of 2004 filed by one Abhijit Das. The dispute is over grant of foreign liquor (off) shop licence. The detailed facts are noted below:

Pursuant to an advertisement in the newspaper on 28th August, 2000, the appellant applied for grant of the said licence near ITC Cigarette Company at Metiabruz and its vicinity. In connection with the said grant of licence a lottery was held for preparation of a panel and the appellant came in the first position in the said panel and she was asked by the Collector of Excise, Kolkata to submit details of site including Blue Print Plan, Rent Receipt, Consent Letter from the landlord etc. On receiving the said letter the appellant requested the Collector of Excise for extension of time to submit an objection-free site. Thereafter, the appellant on 4th May, 2001 made a representation to the Land Manager, Kolkata

Port Trust requesting him for allotment of a shop room for installing a foreign liquor (off) shop and this was informed by the appellant to the Collector of Excise by her letter dated 7th May, 2001.

2. The case of the appellant is that since the land falls under the jurisdiction of Kolkata Port Trust she can offer an objection-free site only upon receiving an order from, the Port Trust. As such, there was some delay on her part in offering the site and as a result of which she had to write on a number of occasions for extension of time to offer the said site. Ultimately, by an order dated 11th September, 2003, the Collector of Excise, Kolkata (South) rejected the appellant''s candidature, inter alia, on the ground of her failure to offer any objection-free site within the prescribed period. Against the said order of the Collector of Excise, the appellant preferred an appeal before the Excise Commissioner on 30th September, 2003. The said appeal was fixed for hearing on 26th February, 2004 and the Excise Commissioner, considering the facts of the case and also the fact that the appellant is a physically handicapped woman, allowed a further extension of period of one month for offering the details of the site and the appellant was informed that she has to intimate the position by 22nd March, 2004.

3. During the pendency of the said appeal one Abhijit Das who was placed at No. 3 in the said panel moved a writ petition being W.P. No. 20033 ((W.i of 2003 before this Hon''ble High Court. In the meantime, the appellant made a detailed representation dated 19th March, 2004 to the Excise Commissioner giving therein the details of the site and the appellant also informed that the Land Manager, Kolkata Port Trust by Memo dated 18th March, 2004 offered an allotment of a small room space at C.G.R. Road near Traffic Building on certain terms and conditions for the purpose of opening of foreign liquor (off) shop. Ultimately, on 29th March, 2004, the appeal of the appellant was taken up for hearing and the appeal was allowed after considering the letter of the Land Manager (IC) Kolkata Port Trust and the Collector of Excise, Kolkata (South) was directed to issue JMFL off licence in favour of the appellant in accordance with law. In the meantime, the writ petition filed by Abhijit Das [W.P. No. 20033 (W) of 2003] came up for hearing and the same was rejected by a learned Judge of this Court by a judgment and order dated 27th April, 2004, inter alia, holding that since the appeal filed by the appellant was allowed by the order dated 29th March, 2004 and since the said appellate order was not challenged in the writ petition, the writ petition cannot succeed. But, liberty was given to Abhijit Das to challenge the order dated 29th March, 2004. Thereafter, on 18th May 2004, Abhijit Das again filed another writ petition challenging the order dated 29th March, 2004 which was heard and disposed of by the learned Judge of the Writ Court along with the writ petition filed by the appellant.

4. In the meantime there was an amendment in the Excise Rules. The first amendment came by Notification dated 29th July, 2003 and the rules which were framed were called "West Bengal Excise (Selection of New Site and Grant of

Licence for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003". But in Sub-clause (2) of the said rules it was made clear that nothing in the said rules shall apply to a licence required to be granted after inviting tenders and/or bid in auction sale. It was contended before this Court by the learned Counsel for the appellant that in view of the aforesaid clause nothing said in the 1993 rules will apply in the case of the appellant. Thereafter, a further amendment took place by a Notification No. 527-EX dated 2nd April, 2004 which was published in the Calcutta Gazette dated 15th April, 2004. This Notification was published by the authorities in exercise of power conferred under proviso to Sub-section (3) of Section 85 and Section 86 read with Sections 30, 31, 36, 37 & 37A of the Bengal Excise Act of 1909, The said Notification is set out below:

Notification No. 527-EX, the 2nd April, 2004.--In exercise of the powers conferred by the proviso to Sub-section (3) of Section 85 and Section 86 read with Sections 30, 31, 36, 37 and 37A of the Bengal Excise Act, 1909 (Ben, Act V of 1909), the Governor is pleased hereby to make, with immediate effect, the following amendment in the West Bengal Excise (Selection of New Sites and Grant, of Licence for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003, published with this Department Notification No. 800-EX dated 29lh July, 2003 (hereinafter referred to as the said rules):

Amendment

In Sub-rule (1) of Rule 8 of the said rules, for Explanation (i), substitute the following Explanation:

Explanation (i).--For the purpose of this rule, ''vicinity'' means a distance of 1000 feet.

(2) For the removal of doubt, it is hereby declared that the amendment made in the said rules by this notification and the said rules shall apply in relation to such licence as if this notification had not been issued.

5. Thereafter an enquiry was held in the site offered by the appellant and it was alleged that there is a signboard of a primary school at a distance of 650 ft. and also there is a mosque at a distance of 496 ft. and in between the offered site there is a railway line leading to ITC Cigarette Company. An order therefore was passed on 13th May, 2004, by the Collector of Excise, Kolkata rejecting the site offered by the appellant. Ultimately, by another order dated 1st July, 2004 the appellant was informed by the Collector of Excise, Kolkata (South) to submit an alternative site for the settlement of the proposed foreign liquor (off) shop licence at ITC Cigarette Company, Metiabruz, failing which the appellant''s candidature shall be cancelled. Challenging this direction and order, the instant writ petition out of which the present appeal arises was filed by the appellant.

6. Both the aforesaid writ petitions came up for hearing. The learned Judge in the judgment under appeal, after noting the relevant facts, came to the conclusion that even though the appeal preferred by the appellant before the

Commissioner of Excise was allowed but the Excise Commissioner, while allowing the appeal in his order, directed the Collector to issue the licence as per procedure and after the appellant furnishes details of her site and proves her possession thereof. The learned Judge thereafter noted that the appellant could not initially offer any objection-free site even for a period of 2 years and 5 months from the order of the Collector asking her to offer such a site. The learned Judge also noted that during the pendency of the application for grant of licence, the relevant rule was amended and the rules in question as amended by Notification dated 2nd April, 2004 and was given immediate effect. The learned Judge held that all the licences which are to be granted should be granted in accordance with the provision of the rules as amended and not otherwise.

7. In fact, in the appeal this was the main point which was urged by the learned Counsel for the appellant namely whether the amendment will affect the procedure for grant of licence in the instant case. The learned Counsel appearing in support of the appellant has urged that a site which was offered by the appellant is within the distance stipulated by the rules which were in existence at the time when applications were invited and also at the point of time when the offer was finally made by the appellant. After that by a Memo dated 13th May, 2004, the Collector of Excise, Kolkata (South) informed the appellant that upon enquiry being conducted in respect of the site offered by the appellant, it is revealed that the said site cannot be accepted in view of Rule 8 of the rules published under Notification No. 800-Ex dated 29th July, 2003 and as amended by Notification No. 527-Ex dated 2nd April, 2004 and the reasons being that there are primary school and mosque in the vicinity of the proposed site. In support of his contention that in so far as the case of the appellant is concerned the amended rules will not apply, reliance was placed on the following judgments :

Circular Properties (P) Limited and others Vs. Calcutta Municipal Corporation and others, , and an unreported judgment dated 2nd May, 2005 of a learned Single Judge in the case of How Wan Fang v. State of West Bengal and Anr. Judgment of the Supreme Court in the case of Hukam Chand etc. Vs. Union of India (UOI) and Others, . The learned Counsel also relied on another judgment of the Supreme Court in the case of Regional Transport Officer, Chittoor and Others Vs. Associated Transport Madras (P) Ltd. and Others, , and also on the decision of the Supreme Court in the case of Dr. Mahachandra Prasad Singh Vs. Hon. Chairman, Bihar Legislative Council and Others, .

8. The learned Counsel for the respondent / State on the other hand, after pointing out the relevant facts of the case relied on the order of the Collector of Excise, Kolkata (South) dated 13th May, 2004 and submitted that the said order reveals that the said site offered by the appellant cannot be accepted in view of the provision of Rule 8 of the said rules as amended. The main objection is that there is a primary school and a mosque in the vicinity of the proposed site.

9. This Court now proposes to consider the relevance of the ratio in those

judgments to the facts of the present case.

10. The Division Bench judgment in the case of Circular Properties (supra) was delivered on interpretation Section 399 of Calcutta Municipal Corporation Act. Section 399 of the Act authorises the Municipal Commissioner to grant renewal/ extension of time for making construction on the basis of a sanctioned plan. The facts of that case showed that construction was stalled in view of Court''s stay order. On vacation of the ''stay order, the builder applied to the Corporation for extension of time to complete the construction and that was refused. The Court held that the Corporation cannot act in a discriminatory fashion and cannot refuse extension when it granted the same in other cases. It is thus clear that principles decided in Circular Properties (supra) have nothing to do with the facts of the present case.

11. The Single Bench order in Hou Wan Fang does not decide anything. The said order is merely a direction upon excise authorities to consider the application for grant of excise licence keeping in mind the fact that process for such grant started in January, 2004 which was before the amendment in the rules was made.

12. This Court is aware of the outcome of those directions and those directions do not throw any light on the points which are at issue in this case.

13. Two decisions of the Supreme Court in the case of Hukam Chand (supra) and Regional Transport Officer, Chittoor (supra) turn on the question whether rules with retrospective effect can be framed under an Act when the legislative mandate under the Act does not authorise framing of rules with retrospective effect. The Apex Court obviously answered the question in the negative by holding that in the absence of a legislative mandate, the delegate of the legislature cannot frame rules with retrospective effect. There can hardly be any dispute with that proposition. But the ratio in those two cases will not apply here.

14. In this case no rules with retrospective operation has been framed. The rules in question has come into force with "immediate effect". This is clearly stated in the body of the Notification No. 527-EX, 2nd April, 2004. By way of amendment, Explanation (i) to the existing Sub-rule (1) of Rule 8 was substituted and it was clarified that the amendment shall not apply to any licence granted under the existing rules before the commencement of the notification. Therefore, the rules is not made retrospective.

15. But if licence has not been granted in that case the amendment will apply. In the instant case the appellant could not satisfy the Court that licence was granted to her prior to 2nd April, 2004. The appellate order of the Commissioner of Excise dated 29th March, 2004 was merely a direction to the Collector "to grant IMFL off licence in favour of the appellant as per procedure after the latter furnishes details of other site and proves possession of the same".

16. This can at the most be construed as a direction to grant licence on fulfilment of certain conditions in future, but it cannot be said that licence was granted to

the appellant prior to 2nd April, 2004. So, the amendment will apply prospectively in all cases where licence has not been granted and will obviously apply in the case of the appellant.

17. The decision of the Supreme Court in the case of Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council and Ors. (supra) has no manner of application in this case. In that case, the Court was considering the effect of a particular rule namely, Bihar Legislative Council Members (Disqualification on Ground of Detection) Rules, 1994 on Schedule X of the Constitution. The Court held in paragraphs 13 and 16 of the judgment that rules being delegated, legislation cannot travel wider than the object of the legislature. This is a well-settled position in law, but has no application here. Nothing has been pointed out to this Court how the amendment in question has travelled beyond the scope of the Act.

18. The Division Bench judgment of Calcutta High Court in the case of Abdul Mannan Lashkar 2001 (1) CHN 435, goes against the contention of the appellant. In Abdul Mannan it has been held that the selection process was not completed and the panel was not prepared prior to the passing of this Act. As such, the Act which was passed prior to the selection being completed, will apply. Similarly in the instant case, the amendment of 2004 will apply as prior to its commencement, licence has not been granted to the appellant.

19. The other Division Bench judgment of Calcutta High Court in the case of Snehanshu Jha v. State of West Bengal 2001(2) CLJ 558, also does not assist the appellant. The question in Snehanshu Jha was whether in view of coming into operation of West Begnal School Service Commission Act, 1997, the post will be filled up in accordance with the said Act or in accordance with the previous management rules. The Court held that just because requisition had been sent as per the rules of 1969, the selection process cannot be said to have commenced and the Court held that the sending of a requisition is merely an administrative act.

20. This Court fails to appreciate the relevance of this ratio to the facts of the present case.

21. For the reasons discussed above, this Court is unable to uphold the contention of the learned Counsel of the appellant. The appeal is accordingly dismissed. The appellant is at liberty to act in terms of the order dated 1st July, 2004 passed by the Collector of Excise, Kolkata (South) within a period of three months from today and failing which, the excise authorities may act in accordance with law,

22. There will be no order as to costs.

Tapan Kumar Dutt, J.

I agree.

Later:

23. Prayer for stay of operation of the judgment is considered and refused.