

**(2003) 11 PAT CK 0014**  
**In the Patna High Court**  
**Case No : C.W.J.C. No. 8306 of 2002**

Shondik Traders

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

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**Date of Decision :** 17-11-2003

**Acts Referred:**

Bihar and Orissa Excise Act, 1915 — Section 34, 35, 41, 89  
Bihar and Orissa Excise Rules, 1919 — Rule 45

**Citation :** (2004) 1 PLJR 266

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

**Bench :** Division Bench

**Advocate :** S.S. Dwivedi, Umesh Kr. Singh, Rajiv Shankar Dwivedi, P.D. Kumar and Shambhu Sharan Singh, for the Appellant; R.K. Dutta, Raj Nandan Prasad for State and Y.V. Giri, Rajen Sahay, for the Respondent

**Final Decision :** Dismissed

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## Judgement

1. The Petitioner, M/s. Shondik Traders initially filed a writ application for direction, to the State authorities to act in terms of the judgment and decree dated 29.5.2000 passed in Title Suit No. 111/2001 whereby the learned Subordinate Judge has quashed the Advertisement issued for grant of additional licence for wholesale vending of Indian Made Foreign Liquor (hereinafter referred to as "IMFL") and Beer and the subsequent steps taken and the settlement made in pursuance of that in favour of Respondent No. 7. The State of Bihar preferred a First Appeal No. 207 of 2002 in this High Court against the said judgment and decree.

2. The Petitioner filed an application in the First Appeal for withdrawal of the Suit itself and the said prayer has been allowed by this Court, the result is that the judgment and decree forming the basis of filing the writ application has been set aside. The Petitioner thereafter filed an application for amendment of the writ application where prayer was made to quash the advertisement, the approval granted by the Commissioner of Excise vide letter dated 22.1.2001 sanctioning

an additional licence for wholesale vending of IMFL and Beer and the consequential steps taken in pursuance of that including the settlement made in favour of Respondent No. 7.

3. The factual matrix for disposal of the present application is that the Petitioner is admittedly holding wholesale licence to deal with IMFL and Beer in the District of Aurangabad since 1988-89, the same is being renewed from time to time. In 2000 the Collector made a proposal for opening of one additional wholesale shop for vending in IMFL and Beer. According to him, the necessity arose because of increasing the revenue of the State, competition in the market and to control the price of IMFL and Beer. He made a recommendation to the Commissioner of Excise for approval/sanction by letter dated 23.12.2000 which has been annexed as Annexure-3 to the rejoinder filed by the Petitioner.

4. The matter was placed before the Commissioner of Excise. He considered the matter and sanction/approval was granted in exercise of the powers u/s 35 of the Bihar Excise Act. In pursuance of this, an advertisement was issued on 18.6.2001 inviting applications from eligible candidates for settlement of wholesale licence fixing 30th June, 2001 as the next date. However, the settlement could not be made on that day for certain reasons, which are not necessary to be stated in this case and, the matter was adjourned to 4.7.2001. On that day Respondents No. 7, 8 and other applicants including Manoj Gupta, a partner of the present firm appeared with the documents and participated in the settlement. As there were, more than one candidate the settlement was made through the process of lottery, Respondent No. 7 was selected and settlement was made, in his favour on 4.7.2001. for remainder period of 2001-2002 and that was renewed for the period 2002-2003.

5. In the meantime the Petitioner filed a Title Suit challenging the advertisement and the subsequent steps and the learned Subordinate Judge giving preference to this case quashed the advertisement, as stated above, which now no longer exists in the eye of law.

6. Learned Counsel appearing for the Petitioner submitted two points-firstly, he submits that there is a complete violation of Rule 45 of the Bihar and Orissa Excise Rules (hereinafter referred to as the "Rules") framed u/s 89 of the Bihar Excise Act, and secondly that the entire steps were actuated by malafide. While elaborating the second submission, he submitted that as per direction for advertisement given by the Commissioner on 16.6.2001, the steps for advertisement were taken prior to it, and the newspaper was approached on 15th June, 2001 though the advertisement was made on 18.6.2001. According to the learned Counsel, the Collector in connivance with the Respondent No. 7 proceeded in haste with a view to make the settlement in favour of the Respondent No. 7.

7. The counsel appearing for the State on the other hand submitted that there was no violation of Rule 45 of the Rules and there were no mala fide and the

steps taken by the Collector were in accordance with the provisions of the Act and the Rules.

8. Rule 45 of the Rules provides that 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.

9. According to the learned Counsel for the Petitioner, none of the two grounds i.e. ascertained demand for such article or to counteract supply through illicit source has been indicated in the recommendation made by the Collector to the Commissioner of Excise on 23.12.2000.

10. There is no specific provision laying down the procedure for grant of whole-sale licence and the procedure prescribed for grant of licence to retail vending is applicable to the same. The provisions incorporated under Sections 34 and 35 of the Act are relevant. According to Section 34 of the Act, the Collector has to consider the question of grant of licence and has to make his recommendations along with the relevant records to the Excise Commissioner and Section 35 of the Act provides that the decision of the Excise Commissioner in the matter shall be final. The stand of the State, as is evident from the counter affidavit, is that after the matter was placed before the Collector, he having taken note of the fact that there is sharp increase in demand opined to create one additional wholesale licence and sent the matter to the Commissioner of Excise and thereafter the Excise Commissioner approved the same. In this connection the statements made in paragraph 13 of the counter affidavit filed on behalf of the State is relevant. The relevant statements are as follows:

...In fact there is continuous increase of 5% of the quota of foreign liquor and beer every year in respect to the previous year. The consumption of the foreign liquor and beer is rising consistently. Data of consumption of foreign liquor and beer in the last 4 years is being enumerated here for convenience which in itself reflects that the consumption has risen up twice in comparison to year 1997-98.

Year Consumption of Foreign Liquor Beer

1997-98 32766 LPL 21731 BL

1998-99 47697 LPL 29749 BL

1999-2000 65152 LPL 35763 BL

2000-2001 72432 LPL 57183 BL

From the above fact it will be clear that the contention of the Petitioner is not based on fact and as such is not tenable.

11. Learned Counsel submitted that these facts are not part of the recommendations made by the Collector (Annexure-3 to the rejoinder affidavit)

and as such those could not be looked into by the Commissioner of Excise for according approval. In this connection he relied upon the judgment of the Apex Court in the matter of Mohinder Singh Gill and Anr. v. Chief Election Commissioner, New Delhi and Ors. 1978 SC 851. In our view the said judgment does not help the Petitioner because the same is applicable in case of a final order passed by the authority. The Collector has not passed the final order that he has made recommendations only and the Commissioner of Excise considered not only the recommendations but also other materials available in the records and thereafter passed the order. In our view, the point raised in this connection is squarely converted by a recent judgment of the Apex Court in the case of Shiv Kumar Bhagat Vs. State of Bihar and Others, . In that case the Collector had recommended for opening of additional wholesale shop not stating the grounds as provided under Rule 45 of the Rules but the other materials were produced before the Commissioner of Excise, who approved the proposal. The approval was quashed by this Court. The Apex Court observed that other materials sent with the recommendations could be looked into by the Commissioner and on the technicality the said approval could not be quashed. On facts, the Apex Court held that the recommendations made by the Collector were not a final decision and the Commissioner was the final authority. Commissioner's taking note of the other facts would not vitiate the process nor would invalidate the decision of the Commissioner to approve the opening of an additional shop on the aforesaid ground. In this connection it would be apt to quote paragraph 19 of the said judgment.

In our view, the High Court was not justified in reaching this conclusion. The Act and the Rules do not provide any particular form in which recommendation has to be made by the Collector for the grant of additional wholesale licence to vend IMFL. The Act and the Rules only provide the procedure to be followed and the matters to be taken into consideration while granting an additional licence. The Act also makes it clear that the final decision has to be taken by the Commissioner and the recommendation of the Collector is subject to the final decision of the Commissioner of Excise. Any decision taken by the Collector, and any licence granted by him, is expressly made subject to the final decision of the Commissioner of Excise. In view of such legal provisions, for successfully challenging the grant of additional licence by the Commissioner of Excise and the recommendation of the Collector, it must be shown that the Collector and, or, the Commissioner while granting the additional licence had not acted on the basis of relevant considerations. It matters little whether the recommendation made by the Collector incorporated the material on the basis of which he had made a recommendation for the grant of an additional licence. He was only making a recommendation and not taking a decision. In any event, while considering the recommendation made by the Collector, the Commissioner called for the relevant record and comments of the Collector, and all the relevant material was actually placed before the Commissioner for his consideration. On the basis of such relevant material he took a final decision to approve the grant of additional

licence. Thus, the recommendation of the Collector which in any event was only a recommendation and not a final decision was approved by the Commissioner who was authorized to take a final decision, was approved by the Commissioner who was authorized to take a final decision, only after application of mind to all relevant considerations by the decision making authority. We are of the opinion that the requirements of the provisions of the Act and Rule 45 have been complied with. We must, therefore, reject the submission urged before us by Counsel for Respondent No. 5 that the grant of additional licence was bad for non-compliance with Rule 45 of the Rules.

12. The further submission advanced on behalf of the counsel for the Petitioner is that the law laid down in the said case is per incuriam as it has not taken note of the aforesaid case (Mohinder Singh Gill's case). We do not agree with the submissions advanced on behalf of the counsel for the Petitioner for the reason that the recommendation of the Collector is not final one, the same is subject to approval by the Commissioner. Absence of reasons as required by Rule 45 in the recommendation of the Collector will not invalidate the recommendations, if there are other materials to show that the requirements of Rule 45 of the Rules has been fulfilled. The Apex Court in that case also held that if it be treated to be some technical defect then also such technical defect or omission will not vitiate the recommendations of the Collector in view of the provisions of Section 41 of the Act. In this connection, it was observed in paragraph 22 of the aforesaid judgment of the Apex Court.

Even assuming that there was some technical defect by reason of some omission on the part of the Collector, inasmuch as he did not mention all the relevant facts in the letter of recommendation itself, the same cannot invalidate, the licence granted by the Excise Commissioner. The omission to mention all the relevant material, which in fact existed, in the letter of recommendation itself, was at best a technical defect or omission and did not vitiate his recommendation in view of the provision of Section 41 of the Act.

13. Thus the first point raised by the learned Counsel for the Petitioner is held to devoid of any merit.

14. So far as the second point is Concerned, the said point also does not appeal to us, the reason being that the Commissioner has already approved for opening of one additional wholesale shop by the order dated 22.1.2001. In pursuance of that the Collector took steps and an advertisement was made. Even assuming that before the letter of the Commissioner dated 16.6.2001 directing to follow correct procedure, for advertisement was reached the Collector initiated the steps for advertisement, the same will not vitiate the settlement. This Court cannot infer mala fide or arbitrary action on the part of the Collector especially when the advertisement has admittedly been issued after receipt of the aforesaid letter on 18.6.2001. The conduct of the Petitioner is also required to be seen. From the record it appears that the Petitioner's son was also one of the partners of the firm in question. He admittedly participated in the settlement as is evident

from the documents on the record. He did not challenge the settlement rather on the other hand participated in the same and after being unsuccessful now the matter has been challenged on behalf of the firm by another partner i.e. the father of the aforesaid Manoj Gupta.

15. Thus we do not find any merit in this case. The same is dismissed.