
(2019) 05 UK CK 0299

In the Uttarakhand High Court

Case No : Special Appeal No. 462, 463 Of 2019

State Of Uttarakhand & Others

APPELLANT

Vs

Deep Upadhyay & Others

RESPONDENT

Date of Decision : 29-05-2019

Acts Referred:

United Provinces Excise Act, 1910 — Section 34(1)
Central Excise Rules, 2002 — Rule 31(2)
Constitution Of India, 1950 — Article 226

Citation : (2019) 05 UK CK 0299

Hon'ble Judges : Ramesh Ranganathan, CJ; N.S. Dhanik, J

Bench : Division Bench

Advocate : S.S. Chauhan, Aditya Singh

Final Decision : Disposed Of

Judgement

Ramesh Ranganathan, CJ

1. Heard Mr. S.S. Chauhan, learned Deputy Advocate General for appearing on behalf of the State and Mr. Aditya Singh, learned counsel for the respondent-writ petitioner.

2. These appeals are preferred by the State Government against the common order passed by the learned Single Judge in Writ Petition (M/S) No.504 of 2019 and Writ Petition (M/S) No.3868 of 2015 dated 18.03.2019.

3. The respondent-writ petitioner filed Writ Petition (M/S) No.3868 of 2018 seeking a writ of mandamus directing the third respondent to grant the bar license FL-7 in his favour for establishing a restaurant by name "City Club" at Rampur Road, Haldwani, as it had already been approved by the State Government, vide its order dated 16.12.2016, on the recommendation of the third respondent. Writ Petition (M/S) No.504 of 2019 was filed seeking a writ of certiorari to quash the order dated 09.01.2019 issued by the respondents to the extent it contained the name of the restaurant of the petitioner namely "City

Club", Rampur Road, Haldwani; a writ of certiorari to quash the order dated 09.02.2018; and a writ of mandamus directing the third respondent to grant the bar license FL-7 in his favour for the restaurant namely "City Club" at Rampur Road, Haldwani, as it had already been approved by the State Government vide order dated 16.12.2016.

4. Facts, to the limited extent necessary, are that the respondent-writ petitioner took a restaurant on rent in Village Manpur, Rampur Road, Haldwani and applied for a bar license to the District Magistrate, Nainital on 04.06.2016; the District Excise Officer, Nainital sought reports from various authorities on 07.06.2016; the respondent-writ petitioner submitted an application form on 15.07.2016 depositing Rs.200/- towards the challan, and Rs.50,000/- through demand draft in favour of the Excise Commissioner, State of Uttarakhand, as processing fee in terms of Rule 31(2) of the Excise Rules; the District Excise Officer, Nainital, after obtaining reports from various authorities, issued proceedings dated 21.09.2016 recommending the respondent-writ petitioner's case to the District Magistrate, Nainital; the District Magistrate, Nainital in turn, by his letter dated 27.09.2016, forwarded the same to the Excise Commissioner, Uttarakhand; and the Additional Secretary to the State of Uttarakhand granted approval for running the bar license FL-7 vide letter dated 16.12.2016.

5. While matters stood thus, the Supreme Court, in its judgment in *The State of Tamil Nadu & others vs. K. Balu & another* (judgment in Civil Appeal Nos.12164-12166 of 2016 dated 15.12.2016), issued various directions including that all states and union territories should forthwith cease and desist from granting licenses for the sale of liquor along national and state highways; this prohibition extended to and included stretches of such highways which fell within the limits of a municipal corporation, city, town or local authority; the existing licenses, which had already been renewed prior to the date of the order, should continue until the term of the license expired, but not later than 1st April 2017; and all the States and Union Territories were mandated to strictly enforce these directions.

6. While the respondent-writ petitioner was required, in terms of the approval granted by the Additional Secretary on 16.12.2016, to deposit the license fee of around Rs.3.00 lakhs, it is his case that, in the light of the aforesaid order passed by the Supreme Court, the State Government could not have granted a bar license in his favour; and, consequently, no useful purpose would have been served on his depositing the license fee, since, in terms of the order of the Supreme Court dated 15.12.2016, he could not have been granted the bar license, as the restaurant in which he sought to establish a bar, though located within the municipal limits of Haldwani, was adjacent to a National State Highway.

7. The Supreme Court clarified, its order dated 15.12.2016, in its order in SLP (C) No.10243 of 2017 dated 11.07.2017, wherein it observed that the purpose of the directions contained in the order dated 15.12.2016 was to ensure that liquor was not sold along and in proximity of highways properly understood which

provided connectivity between cities, towns and villages; and the order did not prohibit licensed establishments from functioning within municipal areas. After a clarification was issued by the Supreme Court, in its order dated 11.07.2017, the respondent-writ petitioner submitted a representation on 03.10.2017 to the Excise Commission. This was followed up with several other representations and, since no action was taken on his representation, the respondent-writ petitioner invoked the jurisdiction of this Court by filing Writ Petition (M/S) No.3868 of 2018. After this Writ Petition was filed on 20.12.2018, an order dated 09.01.2019 came to be passed cancelling the licenses, granted earlier to nine licensees, on the ground that none of them had paid the stipulated license fee. Aggrieved thereby, the respondent-writ petitioner filed Writ Petition (M/S) No.504 of 2019.

8. Both these Writ Petitions were heard together by the learned Single Judge, and a common order was passed on 18.03.2019. After taking note of the pleadings on record, as also the contentions urged by learned counsel on either side, the learned Single Judge observed that the averments in the writ affidavit were specifically denied by way of counter affidavits; the respondents-appellants had tried to state, therein, that the policy for granting license for the financial year 2016-17 had been over, and the criteria for grant of a bar license had been subsequently changed; but the respondents had not disclosed what new criteria they had set; if a new criteria had been fixed, it was incumbent upon the respondents to plead it specifically; since the specific version had not come from the respondents, in regard to the new criteria for grant of a bar license, the Court could not presume that a new criteria had been fixed by the respondents; no doubt, the respondent-writ petitioner cannot claim, to carry on business in liquor, as a fundamental right; however, once the State Government has framed a policy for grant of licenses to sell liquor, it could not deny benefits of the same policy to the respondent-writ petitioner, as similarly situated persons had been granted bar licenses by the State Government; and the order dated 09.01.2019 did not contain any reasons and had been passed merely on presumptions. While quashing the impugned order, the learned Single Judge issued a mandamus directing the respondents to consider the respondent-writ petitioner's case for grant of bar license FL-7 in his favour, at City Club Restaurant, Rampur Road, Haldwani, keeping in mind the previous reports submitted by the departments and recommendation made by the District Magistrate, Nainital. The entire exercise was required to be carried out preferably within three weeks from the production of a certified copy of the order. Aggrieved thereby, the present appeals.

9. Mr. S.S. Chauhan, learned Deputy Advocate General appearing on behalf of the appellants, would submit that the approval of the Additional Secretary, in his letter dated 16.12.2016, was for a grant of license to the respondent-writ petitioner for the excise year 2016-17; the licensee was required to deposit the license fee which he failed to do; the license policy was subsequently changed for the excise year 2018-19; Section 34(1) of the United Provinces Excise Act, 1910

confers power on the State Government to cancel the license, if the fee payable by the holder is not duly paid; it is in such circumstances that the impugned proceedings dated 09.01.2019 was issued cancelling the earlier approval granted with respect to nine establishments; it is not as if the respondent-writ petitioner has alone been singled out for adverse treatment; the new policy prescribes different criteria for grant of a bar license, including the requirement of a minimum distance; since the power to grant the license is conferred on the authorities concerned, this Court could not have issued a mandamus directing the respondents to exercise their discretionary power in a particular manner; and, as a result of the order passed by the learned Single, the appellants are now required to consider grant of a bar license to the respondent-writ petitioner on the basis of the recommendations given in the year 2016-17, though the license now sought can only be granted in terms of the excise policy for the year 2018-19.

10. On the other hand Mr. Aditya Singh, learned counsel for the respondent-writ petitioner, would submit that, in the light of the order passed by the Supreme Court in K.Balu, the State Government could not have called upon the respondent-writ petitioner to pay the license fee, since they were barred from granting licenses for establishment of any bar, even if it is located within the limits of a municipal area, if it is abutting a National Highway; it is only after the Supreme Court, had, by its order dated 11.07.2017, clarified its earlier order in K. Balu, and had made it clear that the prohibition for establishing a bar abutting National Highways, did not extend to licensed establishments located within municipal areas, was the State Government, thereafter, entitled to grant a license, and call upon the licensees to pay license fee; the appellants-respondents did not even respond to the various representations submitted by the respondent-writ petitioner; the specific averment in the writ affidavit, that several similarly situated bar owners were granted licenses, has not been denied in the counter affidavit filed by the excise authorities; no evidence was placed, before the learned Single Judge, by the appellants to show that there has been a change in the excise policy for the year 2018-19; and, in such circumstances, the learned Single Judge was justified in directing the appellants to consider the respondent-writ petitioner's claim, for grant of a bar license, more so as he has a legitimate expectation for the grant of such a license. Learned counsel would also rely on the letter addressed by the Additional Chief Secretary to the Excise Commissioner on 13.09.2017 informing him that, in the light of the aforesaid order passed by the Supreme Court on 11.07.2017, there was no prohibition for grant of a license for opening bars within municipal limits, even if it was abutting a National Highway.

11. The order of the Supreme Court in K. Balu, prohibiting the State Government from granting licenses to establish bars abutting National Highways, is dated 15.12.2016. A day thereafter i.e. on 16.12.2016, the Additional Secretary accorded approval for the grant of a license to the respondent-writ petitioner. In the light of the order passed by the Supreme Court, in K. Balu, the appellants

could not have granted a license to the respondent-writ petitioner; and, as he was not even entitled for the grant of a bar license, the respondent-writ petitioner cannot be faulted for not paying the license fee, since any such payment would have been of no use, and he would not have been entitled for the grant of a bar license anyway. It is only after the Supreme Court had clarified its earlier order dated 15.12.2016, by its order dated 11.07.2017, that the prohibition for establishing bars abutting National Highways did not extend to licensed establishments located within municipal limits, was the respondent-writ petitioner entitled for grant of a bar license, seeking which he made a representation on 03.10.2017.

12. Section 34(1) of the United Provinces Excise Act, 1910 stipulates that, subject to such restrictions as the State Government may prescribe, the authority, granting any license, permit or pass under the Act, may cancel or suspend a license, if any duty or fee payable by the holder thereof be not duly paid. While the authorities, no doubt, have the power to cancel the license, inability of the respondent-writ petitioner to pay the license fee was only because of the order of the Supreme Court dated 15.12.2016. The respondent-writ petitioner had a legitimate expectation to be granted a license since the earlier order of the Supreme Court in K. Balu dated 15.12.2016, was subsequently clarified by the Supreme Court in its order date 11.07.2017.

13. We are satisfied, however, that the learned Single Judge was not justified either in undertaking the exercise of comparative assessment between the policy prevalent in the year 2016-17 and the policy introduced for the year 2018-19, or in faulting the appellants in not showing what changes were brought about in the policies from one year to another. While the appellants were, rightly, directed to consider the case of the respondent-writ petitioner for grant of a bar license, such consideration can only be in terms of the existing policy i.e. policy for the year 2018-19 and not the policy for the year 2016-17 which had expired long ago. If, as is now contended on behalf of the respondent-writ petitioner, there is no change in the policy between the excise year 2016-17 and the excise year 2018-19, it would hardly make any difference to him if his request for grant of license is considered in terms of the excise policy prescribed for the year 2018-19.

14. Yet another contention, urged on behalf of the respondent-writ petitioner, is that the specific averment in Paragraph 17 of the affidavit filed in support of Writ Petition (M/S) No.368 of 2018, has not been denied by the appellants-respondents. In Paragraph 17, the respondent-writ petitioner refers to his representation requesting the third respondent and informing him that, in District Pithoragarh, various bar licenses had been granted to applicants similarly situated as that of the respondent-writ petitioner; and these applicants, in District Pithoragarh, were granted approval by the State Government on 22.12.2016 after approval was granted to the respondent-writ petitioner on 16.12.2016. In the counter-affidavit, filed in reply thereto by the Additional

Secretary, Excise Department, the contents of Paragraph 17 of the writ affidavit are denied, and it is stated that the State Government had issued bar licenses keeping in mind the demand of the customer, to increase the revenue of the State, and to promote tourism.

15. While the writ affidavit does refer to a license granted in favour of Mr. Ashwani Singh' restaurant at Dharchula, Pithoragarh, and in favour of Som Restaurant, Dhari, Pithoragarh, Mr. S.S. Chauhan, learned Deputy Advocate General for the State, would draw out attention to the counter-affidavit filed by the District Excise Officer, Nainital in Writ Petition (M/S) No.504 of 2019, wherein it is stated that the case of Mr. Ashwani Singh was totally different, and the facts were not applicable in the present circumstances. The fact, however, remains that this denial is vague and not specific.

16. Be that as it may, none of these licensees have been arrayed as respondents in the Writ Petition. The Supreme Court, in Chandigarh Administration vs. Jagjeet Singh: held:-

".....We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal /unwarranted action must be corrected, if it can be done according to law - indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the

petitioner if it is found that the petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the petitioner who is present before the court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the petitioner before the court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course - barring exceptional situations - would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi judicial power, we express no opinion. That can be dealt with when a proper case arises.)....." (emphasis supplied)

17. It is only if the individuals, who were granted bar licenses in District Pithoragarh, had been arrayed as respondents, and it had been found that they had, rightly, been granted licenses by the authorities concerned, could the respondent-writ petitioner then have claimed parity. If, on the other hand grant of bar licenses to certain individuals in Pithoragarh district was contrary to law, the respondent-writ petitioner cannot seek parity in illegality. In the absence of these bar licensees being arrayed as respondents in the Writ Petition, even if the Court is satisfied that grant of licenses in their favour is illegal, no order to their detriment can be passed behind their back. We see no reason, therefore, to make a comparative assessment of the respondent-writ petitioner's case vis-à-vis the bar licensees who were granted approval for establishing bars in Pithoragarh district.

18. In the order under appeal, the learned Single Judge has rightly held that the respondent-writ petitioner does not have a fundamental right to carry on business in liquor. We see no reason to interfere with the order under appeal to the limited extent the learned Single Judge had directed the appellants to consider the case of the respondent-writ petitioner for grant of a bar license in favour of "City Club Restaurant" at Rampur Road, Haldwani. We are satisfied, however, that the discretion conferred on the authorities to grant a bar license cannot be fettered or circumscribed by directing them to consider the respondent-writ petitioner's claim in the light of the various reports submitted by the departments and the recommendation made by the District Magistrate, Nainital, all of which related to the excise year 2016-17.

19. A writ of mandamus is not issued for the mere asking. One of the conditions for exercising power under Article 226, for issuance of a mandamus, is that the Court must come to the conclusion that the aggrieved person has a legal right, and that such a right has been infringed. The applicant has to satisfy the Court that he has a legal right to the performance of a legal duty by the party against whom the mandamus is sought. The duty that may be enjoined by a mandamus may be one imposed by the Constitution, a statute, common law or by rules or orders having the force of law. (Director of Settlements, A.P. v. M.R. Apparao : (2002) 4 SCC 638; and Kalyan Singh v. State of U.P. : AIR 1962 SC 1183). No one can seek a mandamus without a legal right. There must be a judicially enforceable right as well as a legally protected right before one, suffering a legal grievance, can ask for a mandamus. A person can be said to be aggrieved only when he is denied a legal right by someone who has a legal duty to do something or to abstain from doing something. (Halsbury's Laws of England, 4th Edn., Vol. I, para 122; State of Haryana v. Subash Chander Marwah : (1974) 3 SCC 220; Jasbhai Motibhai Desai v. Roshan Kumar Haji Bashir Ahmed : (1976) 1 SCC 671; Ferris: Extraordinary Legal Remedies, para 198; and Mani Subrat Jain v. State of Haryana : (1977) 1 SCC 486). In order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority, and the aggrieved party has a legal right under the statute to enforce its performance. (The State of Haryana Vs. Subash Chander Marwaha and others : (1974) 3 SCC 220; Dr Rai Shivendra Bahadur v. Governing Body of the Nalanda College : AIR 1962 SC 1210). If there is no statutory basis for the claim, and there is no provision in the statute imposing an obligation, it would not furnish a ground for issuance of a writ of mandamus. (Union of India v. E. Merck India : (1998) 9 SCC 412).

20. The respondent-writ petitioner has not been able to show any statutory right of his having been violated. His claim is based only on legitimate expectation. It would be wholly inappropriate, in these circumstances, for this Court to issue a mandamus to the appellants-authorities to grant a license or to consider the respondent-writ petitioner's claim, for grant of a bar license, in a particular manner, for no mandamus can be issued directing the authorities to exercise their discretion, to grant a bar license, in a particular manner. If, during the hearing of the case, it is pointed out to the Court that the party has raised a grievance before the appropriate authority, and the authority has not decided the same, the Court may direct the said authority to decide the representation within a stipulated time by a reasoned order. It is, however, not desirable that the Court should don the robes of the appropriate authority, and pass an order itself, or direct the authorities to pass an order in a particular manner. (The Rajasthan State Industrial Development and Ors. Vs. Subhash Sindhi Cooperative Housing Society Jaipur and Ors. : (2013) 5 SCC 427; G. Veerappa Pillai Vs. Raman and Raman Ltd. & Ors. : AIR 1952 SC 192; Life Insurance Corporation of India Vs. Mrs. Asha Ramchandra Ambedkar & Anr. : (1994) 2 SCC 718; H.P. Public Service Commission Vs. Mukesh Thakur & Anr. : AIR 2010 SC 2620; and Manohar Lal Vs.

Ugrasen & Ors. : (2013) 5 SCC 448).

21. While we see no reason to interfere with the order passed by the learned Single Judge, to the extent the appellants were directed to consider the case of the respondent-writ petitioner for grant of a bar license at "City Club Restaurant" situated at Rampur Road, Haldwani, the order under appeal is modified, and instead the appellants are directed to consider the representation submitted by the respondent-writ petitioner, for the grant of a bar license, strictly in accordance with law. As the earlier order which has been set-aside by the learned Single Judge was an order bereft of reason, the appellants shall take a considered decision afresh and pass a reasoned order considering the respondent-writ petitioner's request for grant of a bar license with utmost expedition and, in any event, within two months from the date of production of a certified copy of this order.

22. The order under appeal stands modified, and the special appeals are, accordingly, disposed of. No costs.