

GAHC010258412013



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4234/2013

BADAL KUMAR GURUNG

S/O LT. PREM KUMAR GURUNG R/O NEW COLONY P.O. MARGHERITA, IN
THE DIST. OF TINSUKIA ASSAM, PIN- 786181, PARTNER OF - M/S PEE GEE
ENTERPRISE, JAGUN REGISTERED NO. 967 OF 1992-93 MFL RETAIL SHOP
P.O JAGUN, UNDER MARGHERITA SUB DIVISION, TINSUKIA, ASSAM, PIN-
786181.

VERSUS

THE STATE OF ASSAM AND 7 ORS
REP.B Y THE CHIEF SECRETARY TO THE GOVT. OF ASSAM, DISPUR,
GUWAHATI- 781006.

2:THE SECRETARY OF EXCISE
GOVT. OF ASSAM
EXCISE DEPARTMENT
DISPUR
GUWAHATI- 781006.

3:THE COMMISSIONER OF EXCISE
GOVT. OF SSAM
EXCISE DEPARTMENT
HOUSEFED COMPLEX
DISPUR
GUWHATI- 781006.

4:THE DEPUTY COMMISSIONER
TINSUKIA- 786125.

5:THE SUPERINTENDENT OF EXCISE
TINSUKIA- 786125.

6:THE DEPUTY SUPERINTENDENT OF EXCISE
MARGHERITA DIST. TINSUKIA

PIN- 786181.

7:THE INSPECTOR OF EXCISE
MARGHERITA
DIST. TINSUKIA
PIN- 786181.

8:TINA GURUNG
D/O LT. PRABHAT KUMAR GURUNG NEW COLONY
PO. and P.S. MARGHERITA
DIST. TINSUKIA
PIN- 786181

Advocates :

Petitioner : Mr. A.K. Choudury, Advocate.
Respondent nos. 1 & 4 : Mr. M. Chetia, Jr. Govt. Advocate, Assam.
Respondent nos. 2, 3, 5, 6 & 7 : Mr. R.R. Gogoi, Standing Counsel, Excise Department.
Respondent no. 8 : Mr. J.I. Borbhuiya, Advocate.

Date of Hearing, Judgment & Order : 19.06.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

By seeking to invoke the extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution of India of this Court, the petitioner has preferred the present writ petition challenging [i] a letter bearing no. III-24/98/99/1446 dated 25.05.2011 [Annexure-12] of the Commissioner of Excise, Assam; [ii] an order bearing no. TEX156/93 dated 02.06.2011 [Annexure-14] of the Superintendent of Excise, O/o the Deputy Commissioner [Excise Branch], Tinsukia; and [iii] a judgment dated 22.02.2013 [Annexure-17] passed by the Assam Board of Revenue in Case no. 1E[TIN]/2012. The petitioner has also laid challenge to an approval accorded by the Government to transfer an IMFL 'Off' Licence in favour of the respondent no. 8 and conveyed vide a letter bearing no. Ex.37192/Pt/9 dated 24.05.2011.

2. By the letter dated 25.05.2011, the Commissioner of Excise, Assam had conveyed to the Deputy Commissioner, Tinsukia about the Government approval for transfer of IMFL 'Off' Licence held by one Late Prabhat Kumar Gurung to his daughter, Smti Tina Gurung [the respondent no. 8] vide the letter no. Ex.37/92/Pt/9 dated 24.05.2011. It was mentioned that the Government in the Excise Department vide letter no. Ex.37/92/Pt/9 dated 24.05.2011 conveyed approval for such transfer. It was further mentioned that the IMFL 'Off' Licence was to be transferred from Late Prabhat Kumar Gurung to his daughter Smti Tina Gurung accordingly, subject to clearance of all outstanding dues, if any, with intimation to his office. The said letter dated 25.05.2011 was followed by the order dated 02.06.2011 of the Superintendent, In-Charge, Tinsukia. The order dated 02.06.2011 mentioned that pursuant to Government approval conveyed vide letter no. Ex.37/92/Pt/9 dated 24.05.2011 and a letter of the Commissioner of Excise, Assam bearing no. III-24/98/99/1446 dated 25.05.2011, the transfer of IMFL 'Off' Licence earlier standing in the name of Late Prabhat Kumar Gurung at Jagun Bazar, Margherita, District – Tinsukia, bearing Licence no. 7/92 to Smti Tina Gurung, daughter of Late Prabhat Kumar Gurung was allowed. By the order dated 02.06.2011, Smt. Tina Gurung was allowed to start the functioning the IMFL 'Off' Licence shop with immediate effect. Challenging the same, the petitioner preferred an appeal before the Assam Board of Revenue, which was registered and numbered as Case no. 1E[TIN]/2012. The Assam Board of Revenue vide judgment dated 22.02.2013 finding no merit in the appeal, dismissed the same.

3. The petitioner was the father of Late Prabhat Kumar Gurung. Smti Tina Gurung who is impleaded as party-respondent no. 8 in this writ petition, was the daughter of Late Prabhat Kumar Gurung and is the grand-daughter of the petitioner.

4. The background facts leading to the institution of the instant writ petition can be narrated, in short, as follows :- Late Prabhat Kumar Gurung was granted an IMFL 'Off' Licence bearing Licence no. 7/92 by the respondent Excise Department under the provisions of Assam Excise Act, 1910 read with the Assam Excise Rules, 1945. The IMFL 'Off' Licence granted in favour of Late Prabhat Kumar Gurung [since deceased] was for sale by retail of portable foreign liquor on and from 14.05.1992 and the locality of the Vend was mentioned as Jagun

Bazar, Police Station – Lekhapani, District – Tinsukia.

4.1. It is projected that Prabhat Kumar Gurung, the original licensee had faced difficulties in running the IMFL 'Off' Licence shop during his lifetime and in order to overcome such difficulties, Prabhat Kumar Gurung had entered into an arrangement of partnership by executing a Deed of Partnership dated 08.05.1992 with the Licensee, Prabhat Kumar Gurung as 'Partner no. 1' along with one Sri Anup Das and the petitioner as 'Partner no. 2' and 'Partner no. 3' respectively in the partnership firm styled and named as 'M/s Pee Gee Enterprises'. The said Deed of Partnership was registered before the Sub-Registrar, Tinsukia on 08.05.1992. As per the arrangement made by the said Deed of Partnership, the partnership firm would run the IMFL 'Off' Licence shop under the Licence and would share the profits for their common benefits. As per the Deed of Partnership, Prabhat Kumar Gurung and Partner no. 3 i.e. the petitioner would in the partnership firm in perpetuity whereas Partner no. 2 would retire on completion of 3 [three] years of business of the partnership firm.

4.2. It is the further case of the petitioner that after entering into such arrangement, the IMFL 'Off' Licence shop continued to run under Licence no. 7/92 by the partners of the partnership firm, M/s Pee Gee Enterprise with the active association of the petitioner. The original licensee, Prabhat Kumar Gurung expired on 26.06.2009. On the demise of Prabhat Kumar Gurung, the petitioner as the father of the original licensee, the attorney and a partner of M/s Pee Gee Enterprise submitted an application before the Commissioner of Excise, Assam on 02.07.2009 intimating about the death of Prabhat Kumar Gurung and also the fact that the partnership firm, M/s Pee Gee Enterprise was continuing the business. By the said intimation dated 02.07.2009, the petitioner had also informed the Commissioner of Excise, Assam that he wanted to include other partners in the partnership firm, M/s Pee Gee Enterprise. Subsequent thereto, the petitioner had executed a Deed of Partnership on 20.09.2010 by including [i] Smti Tina Gurung, daughter of Late Prabhat Kumar Gurung, that is, the respondent no. 8; [ii] Sri Sashi Kumar Gurung, another son of the petitioner; and [ii] Sri Sandip Gurung, a grandson of the petitioner as second partner, third partner and fourth partner respectively in the partnership firm named M/s Pee Gee Enterprise wherefrom the

erstwhile Partner no. 2, Sri Anup Das had already retired after 3 [three] years of the business. As per the Deed of Partnership dated 20.09.2010 registered before the Sub-Registrar, Tinsukia on 20.09.2010, the 4 [four] partners decided to contribute and apportion the profit of the partnership firm in the ratio :- 35% : 25% : 20% : 20% respectively. The said partnership firm, M/s Pee Gee Enterprise [IMFL retail shop] was also registered with a Registrar of Firms, Assam on 28.10.2010.

4.3. After the inclusion of 3 [three] new partners including the respondent no. 8 as the second partner in the partnership firm, M/s Pee Gee Enterprise, the petitioner submitted an application before the Deputy Commissioner, Tinsukia on 09.11.2010 along with the supporting documents regarding the partnership firm, M/s Pee Gee Enterprise [IMFL retail shop] to include and endorse the partners' name in Licence no. 7/92 dated 14.05.1992 to facilitate the partnership firm to operate the IMFL 'Off' Licence.

5. It is stated that the application dated 09.11.2010 of the petitioner was followed by a subsequent application dated 28.03.2011 seeking renewal of the Licence for the financial year : 2011-2012 in the name of M/s Pee Gee Enterprise. As the Deputy Superintendent of Excise, Margherita refused to admit the treasury challan submitted by the petitioner for renewal of the Licence, which originally stood in the name of Prabhat Kumar Gurung [since deceased], by the name of M/s Pee Gee Enterprise, the petitioner submitted another application before the Commissioner of Excise, Assam on 05.04.2011. But without consideration of the petitioner's application submitted for M/s Pee Gee Enterprise the State Government in the Excise Department had accorded its approval for transfer of IMFL 'Off' Licence originally issued in the name of Prabhat Kumar Gurung, in favour of the respondent no. 8 by the letter no. Ex.37/92/Pt/9 dated 24.05.2011. Subsequent thereto, the letter dated 25.05.2011 and the order dated 02.06.2011 came to be issued, thereby, denying the claim of the petitioner which, according to him, was legitimate. It is stated that aggrieved by such approval to transfer the IMFL 'Off' Licence in favour of the respondent no. 8, the petitioner had to prefer the appeal before the Assam Board of Revenue vide Case no. 1E[TIN]/2012. But, when the Assam Board of Revenue dismissed the appeal of the petitioner by the judgment dated 22.02.2013, the petitioner has instituted the instant writ petition seeking the reliefs,

mentioned above.

6. I have heard Mr. A.K. Choudhury, learned counsel for the petitioner; Mr. M. Chetia, learned Junior Government Advocate, Assam for the respondent nos. 1 & 4; Mr. R.R. Gogoi, learned Standing Counsel, Excise Department for the respondent nos. 2, 3, 5, 6 & 7; and Mr. J.I. Borbhuiya, learned counsel for the respondent no. 8.

7. Mr. Choudhury, learned counsel for the petitioner has submitted in the manner, already alluded hereinabove. It is his submission that the petitioner being the father of the original licensee, had entered into an arrangement of partnership with the original licensee by the Deed of Partnership, registered on 08.05.1992 to operate the IMFL 'Off' Licence shop for the common benefits of all the partners. He has submitted that the said arrangement had continued since the year 1992 till the demise of Prabhat Kumar Gurung, the original licensee on 26.06.2009. Even after the demise of Prabhat Kumar Gurung, the partnership firm, M/s Pee Gee Enterprise was operating the IMFL 'Off' Licence shop with full knowledge of the respondent authorities in the Excise Department. It is further submitted that when the matters of death of Prabhat Kumar Gurung, the original licensee and operation of the IMFL 'Off' Licence business by M/s Pee Gee Enterprise were brought to the notice of the Superintendent of Excise, the Superintendent of Excise had made an endorsement on the body of the IMFL 'Off' Licence no. 7/92 on 16.02.1993, indicating thereby that the petitioner was legitimately operating the IMFL 'Off' Licence business with due notice of the respondent authorities in the Excise Department. In such view of the matter, the stand taken by the respondent authorities in the Excise Department by taking recourse to the provisions of Rule 233 and Rule 234 of the Assam Excise Rules, 1945 are not sustainable in law. It is submitted by him that after the demise of the original licensee, the petitioner and the respondent no. 8 had also entered into an arrangement of partnership along with 2 [two] other partners on 20.09.2010 and in such view of the matter, it is the partnership firm, M/s Pee Gee Enterprise in whose name, the original licence is required to be transferred instead of transferring it solely in the name of the respondent no. 8, who has been given the benefit of transfer of the licence by virtue of the said provisions.

8. The respondent authorities in the Excise Department has filed a counter affidavit through the respondent no. 3 on 07.01.2014. The stand taken therein is to the effect that one IMFL 'Off' licence issued by the Government in favour of the particular individual cannot be converted to a partnership firm only by a mere partnership deed/irrevocable power of attorney or by a certificate issued by the Registrar of Firms & Societies, Government of Assam. For transfer of one IMFL 'Off' Licence, sanction of the Government is a sine qua non as per the provisions contained in Rule 233 of the Assam Excise Rules, 1945. It is asserted that on the death of the licensee, the Collector may under Rule 234 of the Assam Excise Rules, 1945, with sanction of the State Government, can review the licence for the remainder of the lease on the same terms in favour of the representative of the deceased, if it is satisfied that such representative is fit to hold it. With regard to the matter of transfer of the IMFL 'Off' licence in the case in hand, it is asserted that the original IMFL 'Off' licence was sanctioned by the State Government in favour of Prabhat Kumar Gurung since deceased vide Government Letter no. Ex.37/92/47 dated 09.04.1992 and not in favour of M/s Pee Gee Enterprise. There was neither any sanction nor approval from the Excise Department allowing the individual IMFL 'Off' Licence issued in favour of Prabhat Kumar Gurung [since deceased] to function as a partnership firm in the name and style of M/s Pee Gee Enterprise, as claimed by the petitioner. Discarding the partnership deeds executed by the original licensee, Prabhat Kumar Gurung with other partners including the petitioner, it is contended that those deeds were not relevant in respect of functioning of IMFL 'Off' licence which was issued in the individual name of Prabhat Kumar Gurung [since deceased]. It is stated that Prabhat Kumar Gurung [since deceased], the original licensee of the IMFL 'Off' Licence no. 7/92 had filed an application before the Deputy Commissioner, Tinsukia on 07.09.1992 requesting for transfer of the IMFL 'Off' Licence standing in his name, to that of the registered firm, M/s Pee Gee Enterprise in his place and there was an endorsement also of the Superintendent of Excise, Tinsukia on the body of the said licence on 16.02.1993. It is categorically asserted that such endorsement of the Superintendent of Excise, Tinsukia on the body of the IMFL 'Off' licence no. 7/92 on 16.02.1993 was wholly unauthorized and there was no formal sanction for conversion of the IMFL 'Off' Licence issued in the name of an individual into a partnership firm as such transfer is not permissible under Rule 233 of the Assam Excise Rules, 1945.

9. At this juncture, it is apposite to quote the provisions contained in Rule 233 and Rule 234 of the Assam Excise Rules, 1945. Rule 233 and Rule 234 reads as under :-

233. Transfer of sub-lease. - No transfer of sub-lease [whether entire or partial] of a licence shall be made except with the previous sanction of the State Government. The Collector shall submit such proposal through the Excise Commissioner when there is good and sufficient reason to his satisfaction.

234. Transfer of licence on death of licensee. - On the death of a licensee the Collector may, with the previous sanction of State Government, review the licence for the remainder of the lease on the same term in favour of a representative of the deceased if he be satisfied that such representative is fit to hold it and on the condition that any arrears due from the deceased licensee are recovered before the licence is so renewed. In such case no fresh deposit need be called for.

10. A reading of Rule 233 makes it clear that there can be no transfer of sub-lease of a licence without the previous sanction of the State Government. For transfer of sub-lease of a licence, it is the Collector who has to submit such a proposal through the Excise Commissioner when there is good and sufficient reason to his satisfaction. As per Rule 234, if the licensee of a licence expires, the Collector may with the previous sanction of the State Government can review the licence for the remainder of the lease on the same term in favour of a representative of the deceased, if he satisfied that such representative is fit to hold it and on the condition that any arrears due from the deceased licensee are recovered before the licence is so renewed.

11. It may be true that applications were submitted by the petitioner seeking transfer of the IMFL 'Off' licence no. 7/92, originally stood in the name of Prabhat Kumar Gurung, to M/s Pee Gee Enterprise where he is one of the partners. The applications submitted by the petitioner seeking transfer of the IMFL 'Off' Licence in the name of M/s Pee Gee Enterprise might be under consideration. But the State Government had taken the decision to approve transfer of the IMFL 'Off' Licence which originally stood in the name of Prabhat Kumar

Gurung, to the respondent no. 8, who was the daughter of Late Prabhat Kumar Gurung. Under the provisions of Rule 233 and Rule 234 of the Assam Excise Rules, 1945, there was no authority vested in the Superintendent of Excise to direct conversion of individual IMFL 'Off' Licence to a partnership firm and as such, it cannot be held that by the endorsement dated 16.02.1993 made by the Superintendent of Excise, Tinsukia on the body of the original IMFL 'Off' Licence no. 7/92, the IMFL 'Off' licence stood transferred in the name of M/s Pee Gee Enterprise where the petitioner is one of the partners. The Superintendent of Excise has no authority vested in him by the Assam Excise Rules, 1945 to order entry/substitution of the names of the original licensee, unless sanction is accorded to that effect by the Government under provisions of Rule 233 or Rule 234 of the Assam Excise Rules, 1945. The petitioner has not been able to establish that the IMFL 'Off' Licence originally stood in favour of Prabhat Kumar Gurung, had, at any point of time, stood transferred in the name of M/s Pee Gee Enterprise.

12. The facts emerging from the case records have indicated that the firm M/s Pee Gee Enterprise operated the IMFL 'Off' Licence without any formal approval from the competent authorities in the Excise Department till 24.01.2011. It was on 24.01.2011, Smti Lakchin [Sena] Gurung, wife of Late Prabhat Kumar Gurung and Smti Tina Gurung, daughter of Late Prabhat Kumar Gurung [the respondent no. 8] submitted an application to the Deputy Commissioner, Tinsukia requesting the transfer of the IMFL 'Off' Licence no. 7/92 in the name of Smti Tina Gurung [the respondent no. 8] who undoubtedly was the legal representative of the deceased licensee, Prabhat Kumar Gurung. Along with the said application dated 24.01.2011, the respondent no. 8 furnished the requisite documents along with the legal heir certificate from the competent authority. The proposal regarding transfer of the IMFL 'Off' Licence no. 7/92 earlier stood in the name of Prabhat Kumar Gurung to the name of the respondent no. 8 was sent to the Government by the Deputy Commissioner, Tinsukia on 19.05.2011 and the State Government in the Excise Department after due consideration of the application, accorded the approval on 24.05.2011 allowing the transfer of the IMFL 'Off' Licence to the respondent no. 8, the only daughter of the deceased licensee, Late Prabhat Kumar Gurung. After being so transferred, the IMFL 'Off' licence shop is being run by the respondent no. 8 as on date. The petitioner had sought transfer of the original IMFL 'Off'

licence from his son and the original licensee, Prabhat Kumar Gurung not in his individual name but in the name of a partnership firm, M/s Pee Gee Enterprise, where the other partners are his another son, Sashi Kumar Gurung and a grandson, Sandip Gurung, son of Sashi Kumar Gurung in addition to the respondent no. 8. The respondent no. 8 with the consent of the wife of the original licensee viz. Smti Lakchin [Sena] Gurung and her mother, decided to submit an application seeking transfer of the original IMFL 'Off' Licence from her father's name in her name. Even if it is assumed that had the petitioner made an application seeking transfer of the original IMFL 'Off' Licence standing in the name of his son, then also the respondent no. 8 would have a better claim *qua* the petitioner, being the only daughter of the original licensee. It further appears from the statements made by the petitioner himself in paragraph no. 1 of the writ petition, the petitioner was an employee in the Assam Rifles at first and thereafter, in North East Frontier Agency [NEFA] in the State of Arunachal Pradesh. Subsequent thereto, he served in the Government T.B. Hospital under the Government of Arunachal Pradesh and he obtained voluntary retirement from service in the year 1992. It has, thus, clearly emerged that the petitioner is a pensioner having means to sustain himself. The petitioner has not brought anything on record to dislodge the claim of the respondent no. 8. Merely because the petitioner had submitted applications for transfer of the IMFL 'Off' Licence to the name of a partnership firm, M/s Pee Gee Enterprise at an earlier point of time than the application submitted by the respondent no. 8 seeking transfer, there was no right got vested in the petitioner to be accorded approval to such transfer in his favour. The State action must be fair and reasonable and its action must be free from arbitrariness and in conformity with the statutory prescriptions. Considering from such perspectives, this Court does not anything to hold that the State Government in the case in hand, had exercised the powers vested on it by provisions of Rule 233 and Rule 234 of the Assam Excise Rules, 1945 in any arbitrary, unfair and unreasonable manner.

13. Having regard to the above fact situation obtaining in the case in hand, this Court is of the considered view that there is no good and sufficient reason to interfere with [i] the approval accorded by the State Government vide letter no. Ex.37/92/Pt/9 dated 24.05.2011; [ii] the letter bearing no. III-24/98/99/1446 dated 25.05.2011 of the Commissioner of Excise, Assam; [iii] the order bearing no. TEX156/93 dated 02.06.2011 of the Superintendent of

Excise, O/o the Deputy Commissioner [Excise Branch], Tinsukia; and [iv] the judgment dated 22.02.2013 passed by the Assam Board of Revenue in Case no. 1E[TIN]/2012. The writ petition is found bereft of any merit and the same is liable to be dismissed. It is accordingly ordered. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant