IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.6779 of 2015

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Smt. Indu Devi, aged about 35 years, W/o Anil Kumar Singh, Resident of village- Urdina P.S. Barun, District- Aurangabad.

.... Petitioner

Versus

1. The State of Bihar through the Excise Commissioner, Bihar, Patna.
2. The Excise Commissioner, Bihar, Patna.
3. The District Collector, Aurangabad.
4. The Superintendent of Excise, Aurangabad.
5. Pushpa Devi W/o Kanhaiya Prasad, Resident of Noniya Bigha, P.O. + P.S.- Daudnagar, District- Aurangabad.

.... Respondents

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Appearance :
For the Petitioner/s : Mr. Rajendra Prasad Singh, Sr. Advocate with Mr. Mukesh Kumar Singh, Advocate
For the Respondent No.5: Mr. Satyabir Bharti, Advocate
For the State : Mr. Vikash Kumar, AC to PAAG

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE JUSTICE SMT. ANJANA MISHRA
ORAL ORDER
(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

6 08-07-2015 Heard learned counsel for the petitioner and learned counsels for the State and for the private respondent No.5.

The petitioner seeks quashing of the licence issued to respondent No.5 with regard to retail liquor shop Group No.30 in Aurangabad district.

A Sale Notification was issued on 22.2.2015 inviting applications for different Groups of retail excise shops in the district of Aurangabad. As per the Bihar Excise (Settlement of Licence For Retail Sale of Country/Spiced Country

Liquor/Foreign Liquor/Beer and Composite Liquor Shop) Rules, 2007 (in short ‘Rules’) and the sale notification issued thereunder the settlements of the shops were to be made through draw of lots thrice for each Group of shops and the candidates to be numbered as 1, 2 and 3 on the said draw of lots. The petitioner, respondent No.5 and others applied for retail shops of Group No. 30. The respondent No.5 emerged as the first candidate in the draw of lots, whereas the petitioner was the second candidate. The respondent No.5 was also a retail excise licensee with regard to Group No.15 shops during the financial year 2014-15. As per the provisions of the aforesaid Rules as also the Sale Notification the successful settlee had to deposit 1/12th of the annual licence fee as security deposit and another 1/12th of the annual licence fee as advance licence fee, which was to be adjusted in the month of March closing the financial year. Apart from the same, the licensee was required to deposit 1/12th of the annual licence fee in advance on the first day of each month, which in any event was to be deposited by 20th of the month with the permission of the authorities. As per Rule 17(2) of the Rules, failure to deposit the licence fee for the month by 20th of the month or the next working day, if the same was a holiday, would entail cancellation of the licence and all deposited security money shall be forfeited and shop shall be settled to the second candidate in serial number and if required to the third candidate and if it was not settled with any of the applicants, it shall be settled through a fresh process for remainder of the term. Rule 17 is quoted below :

> "17. Payment of license fee in monthly instalments.- (1) the license fee of each shop shall be fixed by Government for whole Excise year. The one twelfth part of the annual license fee shall be deposited in each month in advance.
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> (2) The monthly instalment of license fee, specified in the licence and determined under the above sub-rule (1), shall be deposited by the licensee in the Government treasuryof the District by the first day of the month, which in any event must be deposited by 20th day of the month if the day is Holiday then next working day, failing which the license shall be cancelled and all deposited security money shall be forfeited and shop shall be settled to the applicant who was second in serial number and similarly to the third number. If, however, shop is not settled with any of the applicants, it shall be settled through a fresh process for remainder of the term."

Respondent No.5 admittedly did not deposit the licence fee for the month of January, 2015 and similarly for the month of February, 2015 with respect to the retail Group No.15 shops. She had, however, filed an affidavit along with her application which was cleverly sworn on 16.2.2015, i.e., even before the publication of the sale notification stating that she was not in arrears of any Government revenue or in Excise revenue as was required by Rule 9 of the Rules. The last date for filing of application was 11th March, 2015. The date of settlement was 16th March, 2015. Prior to that date a notice had been issued by the respondent Excise authorities to respondent No.5 and other defaulters as to why their licences should not be cancelled on account of non-payment of the monthly licence fees. As a matter of fact on 18.3.2015 the licence for Group No.15 shops of respondent No.5 was cancelled. The respondent No.5, however, was allowed to participate in the settlement held on 16th March, 2015 and, as stated above, emerged as No.1 candidate in the draw of lots. Subsequently she deposited the monthly licence fee for the months of January and February, 2015 amounting to Rs.27 lacs on 20th March, 2015 and was granted licence under the present sale notification for Group No.30 retail shops on 31.3.2015.

The factum of deposit on 20th March, 2015, however, has been challenged by the petitioner by bringing on record copy of challan showing actual deposit of the said amount on 29.4.2015 and alleging that there had been no deposit on 20th March, rather a back-dated Nazir receipt issued in favour of respondent No.5. To that reply of the respondents is that the said deposit along with the deposits for settlement was made in cash amounting to more than Rs.7 crores which had to be put in the safe deposit vault of the Collectorate and the same were carefully counted and examined for fake currency notes and as a matter of fact a number of fake currency notes were found and thus the process of deposit in the Treasury by the officials of the Excise Department continued till the second week of May and it is asserted that the deposit by respondent No.5 has not been made before the authorities of the Excise Department on 29.4.2015 but on 20.03.2015.

Learned counsel for the petitioner submits that the case of the petitioner is based essentially upon Rule 9 and Rule 17 of the Rules read with similar provisions in the Sale Notification. Rule 9 is quoted below :

> “9. Qualifications for applicant.- No person shall be allowed to participate in the process of settlement unless he;
> (a) submits within, stipulated period an affidavit to the effect that ;
> I. he is not in arrears to the governments or that he has no due again the government;
> II. his name does not appear in the list of those in arrears to the Excise and Prohibition Department or he is not blacklisted there;
> III. he has not been debarred from holding a license under the provisions of Bihar Excise Act, 1915 or the rules made thereunder nor has he been debarred from holding a license in any other state(s) under similar provisions, nor is he in the list of those who are in arrears to that state/those states nor is he blacklisted there;
> IV. he bears a good moral character and does not have a criminal background, and in the event of his having been convicted for an offence under the Bihar Excise Act, 1915, the Narcotic Drugs and Psychotropic Substances Act, 1985 and/or for a cognizable and non-bailable offence, he has not been sentenced to imprisonment for a period of more than

one year; and
V. in case of his being selected as a licensee, the undertaking that if he is not able to submit within 60 (sixty) days of issue of the license certificates with regard to his not being in arrears to the governments in any of the districts where he held license before or his not being blacklisted there, the licensing authority may revoke or cancel his license.
(b) he submits without fail, in addition to his affidavit mention in clause (a), above, proof of his personal identity, certifying his permanent residence either in the shape of identity card with photo like the voter identity card, passport, PAN of the income tax department or driving license of which attested copy of any of these being appended thereunto or in case the attested copy of identity card with photo is not possible to be appended, he shall necessarily furnish his photo duly attested by a gazetted officer of this state along with attested copy of one of the following certificates issued to him by the competent authority of the state, that is, to say, ration card, residential certificate, water/telephone/electricity bill, statement of live bank account.
Note.- In case of any doubt concerning the genuineness of the affidavit mentioned in clause (a), above, or of the proof of personal identity or other certificates mentioned in clause (b), above, the decision of the officer conducting the settlement of the shop shall be final.
(c) if he has outstanding arrear of excise revenue;
Provided that if his name is found in the list of arrear holder of excise revenue, he may be allowed to participate in settlement only when he makes payment of his entire payable dues before the settlement process and gives an undertaking on stamp paper that if any further arrears are found due with him, as per calculation concerning the said district or any other district, he shall deposit the same within two weeks from the closure of the settlement or the commencement of the licence shop, whichever is earlier;
(d) if he has been convicted by a criminal court for any offence and sentenced to imprisonment for one year or more;

> (e) if his licence has been cancelled during the last three years;
> (f) if he has been debarred from participating in settlement under the provisions of these rules; xxxx"

It is submitted by learned counsel for the petitioner that Rule 9 makes it a condition of eligibility that a person must file an affidavit stating that he is not in arrears of government dues and further it provides that he would be ineligible to participate in the settlement if he has outstanding arrear of excise revenue. It is contended that on both counts licence ought not to be granted to respondent No.5 as she had sworn a false affidavit that she was not in arrears of the government revenue although the fact was well-known to her that she had dues in payment of license fees for the month of January, at the very least when she had sworn the affidavit, and also for the month of February when she filed the same.

It is submitted that apart from the factum of swearing false affidavit she was definitely in default in arrears of revenue which is also accepted by respondent No.5 but no explanation is to be found for the same. In the said circumstances, it is urged by learned counsel that respondent No.5 ought not to have been allowed to participate in the said process of settlement and, if at all she had been so permitted, the licence ought not to have been issued to her and the same having been issued by showing favour to her by the Excise authorities of the State, it ought to be cancelled and the settlement ought to be made in favour of the petitioner who is the second candidate in the draw of lots for the said Group of shops.

Learned counsel also submits that the respondent authorities were bent upon helping the respondent No.5 and have thus even issued a back-dated Nazir receipt regarding payment made on 20^{th} March, whereas the deposit was actually made on 29.4.2015.

Learned counsels for the State as also respondent No.5, on the other hand, support the action of the authorities. It is submitted that the licence fee for the Group shops in question is an annual licence fee and has to be deposited on a month to month basis besides $1/12^{th}$ of the annual licence fee has to be deposited as security deposit and another $1/12^{th}$ of the licence fee as advance licence fee to be adjusted in the last month of the settlement period. It is thus submitted that respondent No.5 cannot be considered as defaulter in the said circumstances till the closure of the financial year and since respondent No.5, as a matter of fact, deposited the annual licence fee for the months of January and February, 2015 by 20^{th} March, which is 11 days before the close of financial year, therefore, she was certainly not a defaulter and eligible for the settlement and grant of licence for the group shops in question for the current financial year as has been done.

The second leg of submission of learned counsel for the respondents is that till the date of settlement, i.e., 16.3.2015 the respondents, particularly respondent No.5 should not be considered to be in dues as the department was clearly covered by the security deposit and advance licence fee initially paid for the said two months and so far as the month of March is concerned, the deposit having been made by 20th of March, hence it cannot be said that the respondent is ineligible for the settlement.

It is also submitted by learned counsel for respondent No.5 that as many as 10 previous year’s licensees having been issued show causes of cancellation they were most probably permitted to participate in the process of settlement for the fresh financial year and thus it could not be said that undue favour had been shown to respondent No.5. Learned counsel, however, is unable to show any such pleadings on the record in support of such stand.

Lastly, learned counsel strongly relies upon the proviso to Rule 9 which lays down that even if a person is found in the list of arrear holder of excise revenue, he may be allowed to participate in settlement if he makes payment of his entire payable dues before the settlement process and gives an undertaking on stamp paper that if any further arrears are found due with him, as per calculation concerning the said district or any other district, he shall deposit the same within two weeks from the closure of the settlement or the commencement of the licence shop, whichever is earlier. It is thus submitted that the provisions of Rule 9 are not to be treated as mandatory or in a hard and fast manner and since respondent No.5 has made deposits by 20th March the licence issued subsequently ought not to be cancelled.

We have considered the submissions of learned counsels for the parties and perused the materials on the record. From the statutory rule framed under Section 89(1) and ((3) of the Bihar Excise Act, 1915 it is evident that a person can participate in the process of settlement if he has no outstanding arrears of Excise of revenue; the applicant has to file an affidavit showing he is not in arrears of government revenue and he has no outstanding dues against government and further that his name does not appear in the list of those in arrears to the Excise and Prohibition Department or he is not blacklisted there. The proviso, however, permits a person to participate in the settlement **only** when he makes payment of his entire payable dues before the settlement process and gives an undertaking to clear any further arrears which are found due with him within two weeks. It is thus evident that for eligibility to participate a person should not be in arrears of government dues or of excise revenue. The proviso, however, stipulates that a person may be allowed to participate in the settlement process on the precondition that he makes payment of his entire excise dues before the settlement process and gives an undertaking to the effect that if any further arrears are found due with him he shall deposit the same within two weeks from the closure of the settlement or the commencement of the licence shop, whichever is earlier.

The key question to be considered is as to whether the respondent No.5 was in arrear of excise revenue on the date of settlement. Sub Rule(2) of Rule 17 of the Rules clearly stipulates that the monthly instalment of licence fee shall be deposited by the licensee in the Government treasury of the district by the first day of the month and in any event must be deposited by 20th day of the month or if the day is holiday then the next working day, failing which the licence shall be cancelled and all deposited security money shall be forfeited and the shop shall be settled to the applicant who is second in serial number and similarly to the third number or it shall be settled through a fresh process for remainder of the term, as the case may be. It is rightly pointed out by learned counsel for the petitioner that Rule 17(2) is mandatory in nature since at each stage the word 'shall' has been used. This Court further finds that consequence of non-deposit is indicated in the said provision by cancellation of licence and forfeiture of security deposit, including creation of rights in favour of third parties, namely, the second and third candidate in the draw of lots. Thus, the Rule appears to be mandatory in nature.

The fact that the licence of respondent No.5 was not cancelled on the 21st January, 2015, when the first default was made by the petitioner in paying the licence fee, by Excise authorities of the district or even on 21st February when for the second time the default was made, cannot enure to the benefit of the petitioner as the Rule being statutory in nature would not depend upon the action of the Excise authorities. As a matter of fact, realizing that respondent No.5 was in arrears of Excise revenue the respondent authorities had also cancelled the licence two days after the settlement on 18th March. However, if that was the position on 18th March this Court fails to understand as to how respondent No.5 would not be considered in arrears of excise due and a defaulter in the eye of law on 16th March.

The plea in the counter affidavit that the petitioner did not make any objection regarding the candidates after the publication of the list of applicants for each of the Group of shops cannot be of any force. So far as the Excise dues of the district are concerned, it cannot be expected that every applicant would be aware of the fact concerning another applicant, that too, with regard to any other Group of shops which may have been settled earlier, on the date of settlement. It is only after the draw of lots has been made and someone has emerged successful that enquiries may be sought to be made by candidates who may be at serial Nos.2 or 3 in the draw of lots with regard to the eligibility of such successful candidate. The same is not true of the authorities of the Excise department and it was for them to have disallowed the respondent No.5 from participating in the settlement having knowledge of the fact that she was in default in not clearing the arrears of excise revenue. So far as the State respondents are concerned, it is evident that respondent No.5 was in arrears of revenue on the date of settlement and they cannot be permitted to shift their responsibility to others.

With respect to the reliance of learned counsel for the respondents, particularly for respondent No.5, upon the fact that the authorities were in possession of the security deposit and advance licence fee together amounting to two months licence fees which thus makes the respondent No.5 a non-defaulter on the day of settlement is concerned, the same has to be rejected. The consequence of non-deposit with regard to each month in advance has been provided in Rule 17 of the Rules and if any such plea is accepted then sub Rule (2) of Rule 17 itself would become obsolete. Failure to deposit the licence fee on the first day of each month and certainly by 20th of that month would make a licensee in arrear of excise revenue and default in payment of instalment of licence fee resulting in cancellation of licence and forfeiture of security deposit. The submissions of the respondents are thus contrary to law and have to be rejected.

No benefit can also be derived by respondent No.5 from the proviso to Rule 9. She had definitely sworn a false affidavit along with her application six days before the sale notification with regard to not being in arrear of excise dues. The same may partly be due to the flaw in the Rules concerned with regard to manner in which affidavit is to be filed, as it does not really fit with the proviso which provides for clearing the dues before the settlement process. This Court is of the view that there ought to have been some clause in the affidavit which enables a person to undertake to clear the arrears of excise dues before the settlement process, as there is some gap between the last date of application and the day of settlement, and the payment of arrears can obviously be made before the settlement process begins.

Be that as it may, it does not lie in the mouth of respondent No.5 to claim any benefit or assistance from the proviso to Rule 9 since payment ought to have been made of the monthly instalments of licence fee for the months of January and February, 2015 at least before the time of settlement. Admittedly the deposit has been made by respondent No.5 on 20th March, four days after the settlement. Thus no benefit of the said deposit can accrue to respondent No.5 as per the proviso to Rule 9 of the Rules.

Thus, in the light of the aforesaid discussions, the writ application is allowed. The licence of Group No.30 shops in the district of Aurangabad issued in favour of respondent No.5 is quashed and the respondents are directed to settle the shops in question in accordance with the Rules in favour of the second candidate in the draw of lots, namely, the petitioner. Let the licence be issued to the petitioner within a period of two weeks from the date of receipt/production of a copy of this order.

(Ramesh Kumar Datta, J)

spal/- **(Anjana Mishra, J)**