

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.2704 of 2016

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M/s Shipra Beverage Private Limited, a company registered under the provisions of the Companies Act, 1956 having its registered office at Karmalichak, Begumpur, Patna City, District - Patna through its Director Shri Vishal Kumar, son of Late Ashok Prasad, resident of Company Sarai, Ward No. 8, Shanti Nagar, P.S. Chowk Bazar, District Rohtas, Sasaram.

.... Petitioner

Versus

1. The State of Bihar through the Secretary, Registration, Excise and Prohibition Department, Government of Bihar, Patna.
2. The Secretary, Registration, Excise and Prohibition Department, Government of Bihar, Patna.
3. The Excise Commissioner, Bihar, Patna.
4. The Joint Commissioner of Excise, Bihar, Patna.
5. The Collector, Gaya.
6. The Assistant Commissioner of Excise, Gaya.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Y.V. Giri, Senior Advocate

Mr. Satyabir Bharti, Advocate

For the Respondent/s : Mr. Lalit Kishore, PAAG

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

(Per: HONOURABLE JUSTICE SMT. ANJANA MISHRA)

Date: 20-04-2016

An interlocutory application, bearing I.A. No.1436 of 2016, has been filed by the petitioner seeking to amend paragraph No.1 of the writ petition and for quashing the order, dated 13.2.2016, contained in Memo No.249, passed by the Collector, Gaya, whereby the Collector, in purported exercise of powers under Section 42(1) of the Bihar Excise Act, 1915, has cancelled the licence held by the petitioner in Form 27 of the Bihar Excise Act, 1915.



2. Having heard learned counsel for the petitioner and the learned counsel appearing for the State and taking into consideration all the facts and circumstances of the case, the amendment, sought for, is, in the interest of justice allowed and the prayer for quashing Memo No.249, dated 13.2.2016, is, now, incorporated in paragraph 1(v) of the main writ petition.

3. I.A. No.1436 of 2016 stands disposed of accordingly.

4. In the present writ application, the petitioner seeks a writ in the nature of *certiorari* for

(i) quashing of the order, dated 2.2.2016, as contained in Memo No.170 (Annexure 4), passed by the Collector, Gaya ,whereby the licence, granted to the petitioner for manufacturing and supplying country liquor in Zone-5, consisting of the districts of Gaya and Aurangabad, has been suspended,

(ii) for setting aside the consequential notice, dated 6.2.2016, as contained in letter No.6 (Annexure 6), issued by the Joint Commissioner of Excise, Bihar, Patna, whereby the contractors of the other Zones have been invited, on 9.2.2016, to submit their offers for supply of country liquor in Gaya Zone, and

(iii) For a further writ in the nature of *certiorari* quashing

Memo No.249, dated 13.2.2016 (Annexure 7), whereby the explanation, offered by the petitioner in response to the earlier show cause notice, has been rejected and the petitioner's licence has been cancelled.

5. The brief facts are detailed hereunder for ready reference:

(i) The petitioner was granted an exclusive privilege for manufacturing and supplying country liquor in Zone-5 (Gaya and Aurangabad) and a licence, in Form 27, was accordingly issued to him by the Collector, Gaya, for the period ending on 31.3.2016. However, on 4.1.2016, on the direction issued by the Secretary, Department of Excise and Prohibition, Bihar, the business premises of the petitioner were inspected by the Assistant Commissioner of Excise, Gaya, along with other excise officials.

(ii) A copy of the inspection report was made over to the petitioner on 04.01.2016 itself, whereby the petitioner was called upon to submit his explanation as to why penal action be not initiated for the irregularities detected during inspection.

6. Thereafter, the petitioner, in pursuance of the said inspection, was called upon, vide letter, dated 09.01.2016, by the Assistant Commissioner of Excise, Gaya, to submit, within three days, its explanation with regard to the alleged two irregularities,

namely, (i) shortage of 821.47 LPL as against stock of 1,84, 903.31 LPL of spirit/liquor and (ii) failure to maintain the minimum stock.

7. It transpires from the letter, dated 27.01.2016, of the Collector, Gaya, that the petitioner, instead of submitting his show cause, in pursuance of show cause notice, dated 09.01.2016, aforementioned, by his application, dated, 13.01.2016, sought for extension of time by three days for submitting his show cause. On the petitioner's failure to submit his reply to the show cause notice, the Collector, Gaya, by letter, dated 27.01.2016, affording another opportunity to the petitioner, directed the petitioner to submit an explanation, within three days, as to why a proceeding be not initiated against him under Section 42 of the Bihar Excise Act (hereinafter referred to as 'the Act'). However, the petitioner, again, failed to submit his reply to the show cause notice. Thereafter, the Collector, Gaya, vide order 2.2.2016, in purported exercise of powers under Section 42 of the Act, suspended the licence of the petitioner and granted him further time of seven days to submit his reply to the show cause notice.

8. Responding to the notice, dated 2.2.2016, whereby the petitioner's licence, in Form 27, was placed under suspension, the petitioner submitted his reply, which came to be received in the office of the Collector on 04.03.2016.

9. While the petitioner was awaiting decision on his reply to show cause, the Joint Commissioner of Excise, Bihar, by his letter, dated 6.2.2016. invited offers for supply of country liquor, *inter alia*, in the Gaya Zone, disclosing, thus, a clear intention to cancel the licence of the petitioner.

10. It appears that during the pendency of the present writ petition, another order, dated 13.2.2016, contained in Memo No.249, came to be passed by the Collector, Gaya, rejecting the explanation offered by the petitioner in response to the earlier show cause notices and also cancelling the licence of the petitioner.

11. Shri Y.V.Giri, learned Senior Counsel, appearing on behalf of the petitioner, urged before us that the show cause notice, dated 4.1.2016, contained in Annexure 2, clearly reveals that the respondents did not contemplate suspension of the petitioner's licence, but merely proposed to impose penalty under Section 42(1)(h) of the Act .

12. It is further urged by Mr. Y. V. Giri, learned Senior counsel, that manufacturing/working wastage of 0.5% is permitted by the rules framed under the Act and the alleged shortage of 821.47 LPL, being within the permissible limit of 0.5%, falls within the permissible manufacturing/working wastage under the relevant rules.



13. However, in order to meet the demand of supply of liquor, the petitioner was directed by the respondent to make supply of country liquor in the district of Sasaram too. Even though the petitioner had sought for extension of time by his application, dated 13.1.2016, so as to submit its reply to the show cause and, notwithstanding the order, directing the petitioner to make supply of country liquor in the district of Sasaram, the Collector, Gaya, vide his letter, dated 27.1.2016, referring to the aforementioned notice issued by the Assistant Commissioner of Excise, Gaya, directed the petitioner to submit his reply, within three days, showing cause as to why a proceeding be not initiated against the licensee under Section 42 of the Act.

14. Since the notice hardly granted any time to the petitioner to submit its reply, the petitioner was unable to do so within three days. Thereafter, ignoring all the facts and circumstances and also the mandate of law, the Collector, Gaya, in purported exercise of power under Section 42 of the Act, proceeded, vide memo No.170 dated 2.2.2016, to suspend the licence of the petitioner. In the said notice, a mere seven days' time was granted to the petitioner to submit his reply to the show cause notice.

15. Learned Counsel for the petitioner submits that the



impugned order, dated 2.2.2016, contained in Annexure 4, also reveals that apart from the two allegations, referred to in the previous show cause notice, the petitioner was also directed to submit an explanation with regard to recovery of 520 cases of country liquor near the composite shop No.7, which had been found loaded on truck No.BR 24G/9573, which was being used by the petitioner for transportation of country liquor from his warehouse to BSBCL godown. Learned counsel for the petitioner further submits that the show cause notice, dated 2.2.2016, was effectively answered by the petitioner in its reply, dated 3.2.2016, which was received by the authority on 4.2.2016, wherein the petitioner offered its explanation in the following manner:

“(i) Allegation of shortage of 821 LPL

The petitioner explained that the same was a manufacturing wastage well within the permissible limit of 0.5% prescribed under the Rules;

(ii) Allegation of failure to maintain

minimum stock It was explained that the petitioner had always ensured adequate supply of country liquor to both the BSBCL Godown and there has been no instance of short supply. The minimum balance could not be found, because it (the petitioner) had also been supplying country liquor to Sasaram Warehouse and there was, admittedly, a stock balance of 1,73,214.64 LPL of spirit, which

was undergoing the process of conversion.

(iii) Allegation of recovery of 520 Cases

The petitioner strongly refuted the allegations. It was stated that the vehicle is neither owned by the petitioner nor leased by it. The fact that the said vehicle is engaged in transporting country liquor from petitioner's warehouse to BSBCL has all the more reasons that it could be engaged by a retail licensee from BSBCL warehouse. Besides, the retail licensees have submitted its explanation stating that it had obtained four permits totalling 2000 LPL and BSBCL invoice was also issued on 29.1.2016 and it was a legal stock purchased by the retail licensees on 29.1.2016 itself."

16. The respondents, however, chose, according to Mr. Y.V. Giri, learned Senior Counsel for the petitioner, to ignore the explanation offered by the petitioner and, without taking any decision to revoke the order of suspension of licence, the Joint Commissioner of Excise, Bihar, arbitrarily and illegally issued notice, dated 6.2.2016, contained in letter No.06, by inviting offer for supply of country liquor in Gaya Zone.

17. It was contended by Mr. Giri, appearing on behalf of the petitioner, that such a notice, inviting applications from other contractors for supply of country liquor in Gaya Zone, explicitly revealed *mala fide* of the respondents. Mr. Giri, learned Senior



counsel, further submitted that such harsh and extreme steps of cancellation of manufacturing licence could not have been taken, especially, in view of the fact that no such action was taken initially, when show cause notice, seeking response to the said allegation, was sought for from the petitioner. It was submitted that, first, the suspension of the petitioner's licence on account of its failure to submit reply to the show cause was wholly uncalled for, and when the petitioner submitted its reply, the same was rejected without assigning any reason and its licence was cancelled. It was also submitted that on account of such action, the petitioner was being made to suffer recurring loss and as such, the action of suspension/cancellation of the licence at the fag-end of the licence period was wholly vindictive and malicious. It was under such circumstances that the petitioner has prayed for revocation of the order of suspension of licence and, subsequent cancellation thereof, which are nothing but an act of highhandedness meant to victimize the petitioner.

18. The respondent, State of Bihar, in the Department of Excise and Prohibition, has seriously contested the matter and filed its counter affidavit stating therein that the order of the Collector, Gaya, whereby the licence granted to the petitioner, in Form No.27, for manufacture and supply of country liquor, has been suspended,



was passed only after careful consideration of the entire materials. It was submitted that the petitioner was found guilty of violating the provision of clause 2 (gha) ii (cha) of the Tender Notice dated 31.1.2014, and, accordingly, the licence of the petitioner has been cancelled under Section 42 of the Act.

19. Learned Principal Additional Advocate General, appearing on behalf of the State, contended that in spite of affording reasonable opportunity to the petitioner, the petitioner had failed to submit its satisfactory explanation, within the stipulated period, with regard to the raid conducted, on 4.1.2016, in the business premises of the petitioner and also with regard to the recovery of country liquor from the vehicle parked behind the composite liquor shop No.7. As such, the petitioner's licence was rightly suspended vide letter contained in Memo No.170, dated 2.2.2016 (Annexure 4). By suspending the licence, under Section 42 of the Act, the respondents had again asked the petitioner to submit an explanation within seven days. However, the explanation, submitted by the petitioner, was found to be unsatisfactory and, accordingly, the licence, granted to the petitioner under Form 27, was cancelled by a reasoned order, dated 13.2.2016, as contained in Annexure C to the counter affidavit. Since the explanation, offered by the petitioner, was clearly found



to be in contravention of the rules as well as the tender notice, the licence of the petitioner was cancelled by a reasoned order upon due consideration of the facts and circumstances of the case. It is contended that the respondent has *prima facie* reason to believe that the petitioner was using the licence in an illegal manner and, therefore, the allegation of *mala fide*, on the part of the respondents is misconceived and cannot be sustained.

20. It is further contended by the learned Principal Additional Advocate General that Section 42 of the Act envisages two types of suspension: (i) suspension by way of punishment and (ii) suspension pending clarification from the licensee before cancellation. So far as the petitioner is concerned, Annexure 4 was passed pending clarification. It was submitted that originally, the petitioner had come to this Court against the show cause notice, but, thereafter, the order cancelling the petitioner's licence came to be challenged by way of interim applications.

21. We have heard Mr. Y. V. Giri, learned Senior Counsel, appearing for the petitioner, and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the State.

22. According to the petitioner, the impugned actions

have been taken in glaring contravention of the provisions of Section 42 of the Act. In order to proceed to determine the issue, which has been raised in the present litigation, it would be appropriate to consider the provisions of Section 42(1) of the Act, which read thus:

Power to cancel or suspend license, permit or pass. – (1) Subject to such restrictions as the State Government may prescribe, the authority who granted any licence, permit or pass under this Act may cancel or suspend it –

- (a) *if it is transferred or sublet by the holder thereof without the permission of the said authority; or*
- (b) *if any duty or fee payable by the holder thereof be not duly paid; or*
- (c) *in the event of any breach by the holder thereof, or by any of his servants, or by anyone acting on his behalf with his express or implied permission, of any of the terms or conditions thereof; or*
- (d) *if the holder thereof is convicted of any offence punishable to revenue under this Act or any other law for the time being in force relating to revenue, or of any cognizable and non-bailable offence, or of any offence*

punishable under the Dangerous Drugs Act, 1930 (2 of 1930) or under the Merchandise Marks Act, 1889 (4 of 1889), or under other section which has been introduced into the Indian Penal Code by Section 3 of that Act; or

- (e) *if the holder thereof is punished for any offence referred to in clause (8) of Section 167 of the Sea customs Act, 1878 (8 of 1878); or*
- (f) *where license, permit or pass has been granted on the application of the holder of an exclusive privilege granted under Section 22 on the requisition in writing of such holder; or*
- (g) *if the conditions of the licence, permit or pass provide for such cancellation or suspension at will.”*
- (h) (i) *for breach of such conditions of licence, which caused loss of revenue to the State (including Excise duty, other admissible fee, Sales tax etc.) in addition to the total amount of loss on equal amount shall be imposed as penalty.*
- (ii) *Penalty of two hundred percent of loss of revenue shall be imposed for subsequent economic offence committed under clause h(i) of the said sub-section (1).”*



23. According to the learned Senior Counsel, appearing on behalf of the petitioner, the provisions of Section 42 of the Act, as it existed, are capable of only one interpretation that the authority, who would issue the licence, may either suspend or cancel it. Both are by way of punishment and subject to appeal and revision. Since the power to suspend or cancel a licence is by way of punishment, it necessarily follows that before the order of suspension is made, an opportunity be given to the licensee to have his say in the matter.

24. In the present case, a perusal of the order, contained in Annexure 2, clearly reveals that it was not the licensing authority, who initiated any action against the petitioner-distillery; rather, at the instance of the Secretary, Excise and Prohibition Department, Bihar, Patna, an inspection was conducted by the Assistant Commissioner of Excise, Gaya, who submitted a report against the petitioner and, simultaneously, vide report, dated, 4.1.2016, the petitioner was directed to submit his show cause, if any, as to why punitive action be not taken against him under the provisions of Section 42(g)((h) of the Act. Learned Senior Counsel, appearing for the petitioner, submits that a perusal of Memo No.170, dated 2.2.2016, whereby the petitioner's licence has been placed under suspension, clearly reveals that there is no application of mind by



the Collector, who is the licensing authority under the Act, inasmuch as the licensing authority had acted not on the basis of the application of its own mind, but on the basis of the directions issued by the Secretary, Excise and Prohibition Department, Bihar, Patna.

25. In fact, from the pleadings available on the record and upon hearing the learned counsel for parties, it transpires that the entire action against the petitioner emanated at the behest of the higher authorities leaving the respondent Collector with no option but to tow the line of the Commissioner. The order, passed by the Collector, is based on no independent application of mind and, as such, the Collector has clearly failed to exercise the power vested in him and, by placing the petitioner distillery under suspension. Further, the Collector, by initiating a proceeding against the petitioner for cancellation of licence, has acted wholly illegally and against the mandate of law. Learned Senior Counsel, appearing for the petitioner, in support of his contention, has relied on a Division Bench decision of this Court in ***Thakko Choudhary v. State of Bihar***, reported in ***1971 PLJR 199***. In ***Thakko Choudhary*** (supra), a similar issue was dealt with, wherein it has been held as follows :-

“The power to cancel or suspend a licence is by way of punishing the delinquent

licensee. That being so, it follows that before the order of any kind is made an opportunity has got to be given to the licensee to have his say in the matter.”

26. It, thus, appears that wherever there is power to suspend or cancel a licence by way of punishment, it necessarily follows that before issuance of such an order, an opportunity be given to the licensee to have his say in the matter. No such opportunity was provided to the petitioner before suspending his licence and even, thereafter, the cancellation order without consideration of the show cause appears to be wholly in contravention of the rules and illegal in the teeth of the provisions of the law relevant thereto.

27. It is also contended by the learned Senior counsel, appearing for the petitioner, that in the notice to the show cause, no indication was given by the respondents as to the nature of punishment sought to be inflicted on the petitioner. Such a notice was also in violation of the principles of natural justice. It was contended that the principle of administrative law indicated that the natural justice is not an empty formality and that the principle of *audi alteram partem*, which meant a right to be heard, clearly implied that a proper show cause notice ought to be issued informing the person about the penalty to be imposed and how he

was expected to be punished.

28. In the instant case, the notice, as contained in Annexure-3, does not indicate that the respondents had contemplated suspension of the licence. Even though the petitioner has submitted show cause, the respondents, without considering the same, proceeded to pass the order of suspension of licence in purported exercise of the power vested in him under Section 42 of the Act, which is not sustainable in law. We are tempted to take this view from the decision of the Supreme Court, in ***Gorkha Security Services v. Govt. (NCT of Delhi)***, reported in **(2014) 9 SCC 105**, wherein the Division Bench of the Supreme Court has held as follows :

“21.The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of

are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action.”

29. Learned Senior counsel, appearing for the petitioner, has also referred to a decision of the Supreme Court, in ***Whirlpool Corporation v. Registrar of Trade Marks***, reported in (1998) 8 SCC 1. In ***Whirlpool Corporation*** (supra), wherein the Supreme Court has held that existence of alternative remedy is not a bar in exercise of jurisdiction by the Writ court under Article 226 of the Constitution of India. It would be relevant to quote Paragraphs 14 and 15 of the said judgment, which read thus:

“14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for “any other purpose”.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High



Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.”

30. Further, in **Whirlpool Corporation** (supra) , the Supreme Court has, in paragraph 20, held as follows :

“20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under Article 226 of the constitution, in spite of the alternative statutory remedies, is not affected, especially in a case

where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.”

31. In the present case too, the excise authority had passed the order, cancelling the licence of the petitioner, in purported usurpation of jurisdiction as the entire action has been emanated from the instructions of the Secretary, Department of Excise and Prohibition.

32. Section 42(h) of the Bihar Excise Act is quoted below:-

“ 42. Power to cancel suspend license, permit or pass, or impose penalty.-

- (1)
- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h) (i) *for breach of such conditions of licence, which caused loss of revenue to the State (including*

Excise duty, other admissible fee, Sales tax etc.) in addition to the total amount of loss on equal amount shall be imposed as penalty.

(ii) Penalty of two hundred percent of loss of revenue shall be imposed for subsequent economic offence committed under clause h(i) of the said sub-section (1).”

33. Having heard the learned counsel for the parties concerned and upon due consideration of the provisions of law, this Court is unable to sustain the action taken by the concerned respondents. It is manifestly clear that the authorities have not only assumed a power not bestowed upon them, but have also clearly disregarded the provisions of the Act and have also proceeded to act in utter contravention of the principles of natural justice. The act of the respondents demonstrates that they failed to make the petitioner substantially aware of the charge, which the petitioner was facing before passing the order of suspension of licence. The breach of the provisions of law have not been spelt out in the show cause notices issued to the petitioner and, without doing so, they have passed the impugned order, thus, visiting the petitioner with serious consequences and loss. We, thus, feel that such an act of the respondents is not sustainable in the eye of law.

34. We, accordingly, set aside the impugned orders

contained in Annexure-4 and impugned notice, dated Annexure- 6.
We also quash the order, dated 13.02.2016, contained in Memo No.
249 (Annexure-7).

35. The writ application is, thus, allowed.

(Anjana Mishra, J)

I. A. Ansari, ACJ I agree.

(I. A. Ansari, ACJ)

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