S/L. 4.
28.08.2019
MNS

Calcutta High Court
In The Circuit Bench At Jalpaiguri
Appellate Jurisdiction

WPA 241 of 2019

Narayan Prasad Gupta and another
Vs.
The State of West Bengal and others

Mr. Krishnendu Sarkar,
Mr. Partha Pratim Sarkar,
Mr. Amit Roy

…for the petitioners.

Mr. Subir Kumar Saha,
Mr. Bikramaditya Ghosh

…for the respondent authorities.

Mr. Satya Ranjan Kundu,
Mr. Sudhir Kumar Das

…for the private respondent.

The present challenge is directed against the grant of an excise licence to the daughter of the deceased original co-licensee. The brothers of the said applicant (the private respondent) are the present petitioners.

Learned counsel appearing for the petitioners submits that the initial order passed by the Collector, which was affirmed by the Excise Commissioner, refusing to grant such licence to the private respondent, was justified in law as well as in facts. The reversal of the same by the impugned order passed by the Additional Chief Secretary, Finance

Department, Government of West Bengal, did not take into account the relevant factors, both legal and factual, and as such, ought to be set aside.

Learned counsel for the petitioners places reliance on Section 37 of the Bengal Excise Act, 1909, which provides that, before granting a licence for the sale of an intoxicant (as in the present case), the collector shall select, in such manner and subject to such restrictions as the State Government may prescribe, a person to whom such licence may be granted.

Rule 14(6) of the West Bengal Excise (Selection of new Sites and Grant of Licence for Retail Sale of Spirit and Certain Other Intoxicants) Rules, 2003 provides that, notwithstanding anything contained elsewhere in the rules or in any other rules for the time being in force, when a licence granted by the Collector at an existing site lapses on the death of the holder, a licence of the same category in lieu of the one lapsed, shall be granted in favour of one or more heirs or representatives of the deceased licensee along with the surviving partners/surviving joint licensees, if any, at the existing site, if such representatives are willing and eligible to hold the licence and pay the arrears, if any, due from the deceased licensee.

The first proviso to the said sub-section stipulates that where it is not possible to grant licence under that sub-rule to any representative of the deceased licensee with or without the surviving partners/surviving joint licensees, as the case may be, the said licence may be granted in favour of all the surviving partners/surviving joint licensees.

The second proviso to the said sub-section stipulates further that in the case of cessation of partnership due to death, no licence shall be granted to the person or persons who have been partners, unless the partnership was validly reconstituted and the Excise Commissioner accords his approval to the grant of a licence to the reconstituted partnership firm.

Learned counsel, relying on the first proviso, argues that, despite the willingness and eligibility of the private respondent, it was the discretion of the authorities to refuse to grant licence to the applicant (the private respondent) and continue with the surviving joint licensees.

Learned counsel for the petitioners also cites, in this context, Rule 223A of the

Consolidated Rules made under Section 86 of the 1909 Act. The said rule provides that, except when exempted by the Commissioner of Excise or the Collector, every licensee shall be present in his shop during such hours of the day as may be prescribed in that behalf by the Superintendent of Excise with the approval of the Collector. Leave of absence for a period not exceeding one month may, however, be granted by the Superintendent of Excise.

Placing reliance on the said provision, learned counsel submits that the Excise Commissioner took into consideration the aforementioned sub-rule in turning down the prayer of the applicant for being granted licence along with the surviving licensees/surviving joint licensees, by recording that the residence of the applicant (the private respondent) was far away and it was not possible for her to look after the shop on a daily basis. The further considerations, which were the premise of such refusal by the Commissioner, were that the applicant therein had failed to apply along with non-refundable application fees and that she had no experience in managing the daily affairs of a C.S. shop.

Learned counsel for the petitioners next places reliance on the West Bengal Excise (Change in Management) Rules 2009. Placing reliance on Rule 4(1) thereof, it is argued that when an application for change in management of an excise licence is made to the Collector, no such application shall be considered unless it is accompanied by an appropriate receipted Treasury Challan showing payment of a non-refundable application fee similar to the one applicable for grant of a new excise licence in the same category in the same local area.

It is further submitted that the provisions of the said rule make it clear that the change in management in the event of death of an original licensee is already covered under the said rule.

As such, the yardsticks applied by the Commissioner, as to the private respondent having not deposited the non-refundable application fee, was also a proper criterion for refusal of her application.

Learned counsel next cites an unreported Division Bench judgment of the Principal Seat dated September 12, 2002 passed in ***WPTT No. 11 of 2002 (M/s. M. N. Pramanick and others Vs. State of West Bengal and***

others), wherein it was held, *inter alia*, that although there was no question of raising any controversy as regards the willingness and fitness of the respondent no. 4 therein, the concerned authority was not justified in thrusting him upon the surviving joint licensees with whom he did not seem to have a pleasant functional relationship. After all, it was held, the business was to run and this was of primary concern for the excise authority.

It was further held by the Division Bench that it was not desirable that a running business should be unreasonably thrown into an ocean of uncertainty. It was not disputed in the said case that the relationship between the surviving joint licensees and the applicant therein were far from healthy and the concerned authority, it was held, was not at all justified in passing an order, which in effect would compel the surviving joint licensees to join hands with the applicant and thus create functional disharmony in the running of the business.

Learned counsel for the petitioners argues that the very challenge preferred to the application of the private respondent by the petitioners at every juncture *ipso facto* is sufficient to show the functional disharmony prevailing among the applicant (the private respondent) and the present petitioners. Moreover, the authorities concerned ought to have taken into consideration the lack of experience of the private respondent in running such business, since the grant of licence did not amount to inherentance of a property of the deceased licensee but was a privilege conferred upon the proposed licensee.

In countering such arguments, learned counsel for the respondent-authorities argues that Rule 223A of the Consolidated Rules referred to above, itself provides for an exemption by the Excise Commissioner or Collector in respect of the hours during which the licensee has to attend the business. In fact, it is submitted, there is even the scope of grant of leave of absence for a period not exceeding one month by the Superintendent of Excise, which leaves sufficient scope for the applicant (the private respondent) to have taken advantage of such relaxation regarding the hours of her presence in the shop-in-question.

It is further contended that the only relevant criteria in Rule 14(6) of the 2003 rules are whether the applicant is willing and eligible to get a licence. There was no other consideration in-built in the said provision to debar the private respondent from getting a licence, which was her right as an heir of the deceased original licensee.

Learned counsel for the private respondent, apart from adopting the arguments of the respondent authorities, places reliance on Rule 5 of the 2009 Rules and submits that, in case of initial grant of licence, no fee was payable for change in management in case of death of an individual licensee or proprietors(s) of any proprietorship firm, when the new licensee(s) and/or proprietors(s) is/are selected from amongst the legal heir(s) or representative(s) of such deceased licensee or proprietor and when such newly selected licensee(s) or proprietor(s) is/are willing and otherwise eligible to hold the license. As such, it is submitted that the non deposit of such non-refundable application fee was waived in the present case.

In this regard, learned counsel for the respondent-authorities submits that the said defect, at its worst, was a curable one and could not be a ground for rejection of the application of the private respondent.

In reply, learned counsel for the petitioner reiterates that the question of there being a partnership, as harped on by the respondent-authorities, was not a consideration in the division bench judgment cited by the petitioners. The only consideration was that a non functional relationship between the joint licensees could not be enforced if it was evident that there was a disharmony between the business of the original licensee and the surviving licensees.

Upon a consideration of the submission of all the parties, it is evident that the Excise Commissioner proceeded on erroneous yardsticks of law.

The first ground of rejection, being the non-deposit by the private respondent of the non-refundable application fees, was a curable defect and the Commissioner could very well have permitted the proposed licensee (the private respondent) to put in such fees or to permit the private respondent to file a new application upon deposit of such fees, if at all payable, before rejecting the application on such technical ground.

That apart, a composite reading of Rule 4 and proviso (a) to Rule 5(1) of the 2009 Rules reveals that no application for change in management of a licence shall be considered unless it is accompanied by an appropriate receipted treasury challan showing payment of a non-refundable application fee *similar to the one applicable for grant of a new excise licence* in the same category in the same local area. The expression "similar to the one applicable for grant of new excise licence" has to be read in context of proviso (a) of sub-rule (1) of the rule 5 of the 2009 Rules, which exempts the payment of such initial grant of licence fee in case of death of an individual licensee or proprietor. As such, since the quantum of licence fee payable in case of initial grant in case of death of individual licensee is zero, taking Rule 4(1) in proper perspective, the non-refundable application fee payable in case of change of management has to be *similar to the one applicable for grant of a new excise licence*, being zero in case of an application for change of management in case of death of a licensee.

As such, the Excise Commissioner acted patently without jurisdiction in applying the test to non-payment of application fees as a ground for rejection of the application of the private respondent, since no such fee was payable at all by the private respondent.

Regarding the other consideration, as to the private respondent having no experience in managing the daily affairs of C.S. shop and her residence being at a distance place, those were entirely based on erroneous footing. As far as experience is concerned, every person has to start a business at some point of time in order to become successful in the said business. There has to be starting point for every endeavour and mere lack of experience cannot be read into the prevailing law, being Rule 14(6) of the 2003 Rules, where it is absent in the rule itself. Prior experience and lack of proximity to the shop-in-question or business are not the yardsticks stipulated in the said rule but only the willingness and eligibility of the candidate.

In the present case, the private respondent is otherwise eligible and obviously willing to come in as a co-licensee in the said C.S. shop. The conjecture as to her being unable to attend the shop daily, was not merely a futuristic apprehension but also somewhat contrary to Rule 223A of the Consolidated Rules.

As rightly argued on behalf of the respondent-authorities, the consolidated rules clearly provide for an exemption by the

Commissioner of Excise or the Collector regarding hours of a day during which a licensee has to be present in a shop and also provide for leave of absence for a period not exceeding one month to be granted by the Superintendent of Excise in certain cases. In any event, such an exemption would be a post-facto event after the grant of licence, applicable once the applicant becomes a licensee, and cannot be a pre-condition for grant of licence to an applicant.

Hence, the Excise Commissioner acted without jurisdiction on all scores to reject the application of the private respondent.

Now taking into consideration the Division Bench decision cited on behalf of the petitioners in proper perspective, the said judgment could only be held to be a precedence on similar facts as visited the case which was under consideration by the division bench. In most of the pages of the said judgment, there is evidence galore that the agreement between the concerned partnership firm was a consideration in passing the judgment, at least in so far as the lack of harmony between the surviving licensees and the applicant therein was concerned. The division bench took into consideration that there was a partnership deed and there was a previous claim of settlement of licence. A clause in the partnership deed, which provided for the scenario in the case of death of any of the partners, was also considered by the division bench. Rules 20 and 22 of the deed were also taken into consideration. Although it was held by the division bench that mere approval of the partnership deed does not in any way indicate that the licence was granted in favor of the partnerhip firm and the provisions of laws and rules cannot be circumvented by such approval, it appears that the division bench took into consideration that the partnership deed, as referred to earlier in the said judgment, might at best be considered as a working arrangement between such joint licensees which again gets approval of the concerned authority from time to time. It was further referred to in the judgment that there were several communications and information expressed in writing by the surviving licensees, objecting to the induction of the applicant therein and it was also recorded in the judgment of the division bench that the said judgment was rendered not only on a consideration of the relevant rules but in the facts and circumstances of the said case, which clearly reveal the absence of a pleasant relationship between the proposed licensees.

The parameter in-built in the second proviso to Rule 14(6) of the 2003 Rules indicates that the yardsticks and parameters regarding partners and in case of cessation of partnership due to death were separately indicated in the said proviso, thereby drawing a certain distinction between an ordinary licence and a partnership business. The said proviso and the scheme of the rules, read in conjunction with the division bench judgment, which took into consideration the fact that the present deed could at least be taken as an workable arrangement, make it evident that the ratio laid down in the said division bench judgment does not fit the factual matrix of the present case at all and rested on altogether different material parameters than those of the present case.

In such view of the matter, in view of no clear previous objection or serious allegation by the petitioners being found on record, pointing out that the induction of the private respondent would create a serious disharmony in running of the business, in any event, the Additional Chief Secretary of the Finance Department, Government of West

Bengal, was justified in passing the order impugned in the present writ petition, thereby granting licence to the private respondent to the C.S. shop in question.

Accordingly, WPA No. 241 of 2019 is dismissed on contest without, however, any order as to costs.

Let photostat certified copies of this order, if applied for, be made available to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)