

05.08.2021

Ct. No.13

Sl. No.70

pk/akd

W.P.A. 10755 of 2021 [via video conference]

[Sri Kumar Santu Roy -Vs- The State of West Bengal & Ors.]

Mr. Debajyoti Basu

Ms. Reshmi Mukherjee

... .. for the petitioner

Md. T. M. Siddiqui

Mr. Sayan Ganguly

... .. for the State

The writ petitioner is aggrieved by an order dated 8th June, 2021 passed by the Additional District Magistrate (G), Malda cancelling and revoking with immediate effect, licence dated 18th December, 2020, granted to the petitioner under the Sarais Act 1867.

By reason of an indenture of lease granted by the Governor of West Bengal dated 17th March, 2011 the petitioner come into possession of the land in question over which a hotel called 'Royal Ford Inn' has been constructed and established.

The first paragraph on the second page of the said lease stipulated as follows:-

"WHEREAS the LESSEE has applied for permission to occupy for the purpose of manufacturing of bakery items, confectionery and packaged Food/Rice, Wheat Mill, Packaged Mineral Water Plant, Potatoes Chips, Jam, Pickles etc., Milk processing Unit like Paneer, Ghee etc. the land hereinafter mentioned and described in **Part-I** of the Schedule hereunder written and WHEREAS such application has received the approval of the State Government in the Land and Land Reforms Department."

By a application dated 7th June, 2020 the writ petitioner furnished nine several documents and applied before the District Magistrate, Malda, for issuance of a new Sarai registration and license in respect of said hotel on the leasehold land. Curiously,

the aforesaid lease deed does not appear to have been submitted along with the list of documents.

Based on the said application and subsequent correspondence, the Additional District Magistrate (G), Malda granted license to the petitioner namely, Kumar Santu Roy, proprietor of 'Hotel Royal Ford Inn' agricultural farm on 18th December, 2021. The particulars of the said leasehold land where the Sarai is to be located is mentioned in the license. However, by the impugned order the said Sarai licence was cancelled and revoked for violation of norms laid down in the lease deed granted to the petitioner to set up a hotel in the first place.

Learned counsel for the petitioner would argue that the disputes, if any, as regards violation of lease deed is between the writ petitioner and the B.L.&L.R.O/L and Reforms Department. Such disputes cannot be the subject matter of any proceedings under the Sarais Act, 1867.

It is next argued that the petitioner was not served notice prior to termination as mandated under Sections 3,4 & 9 of the said Act. Hence the Cancellation Order has been passed in violation of principles of natural justice. The impugned order must be set aside. It is also argued that there is no power under the Sarais Act, 1867 to cancel a lincense already granted. The DM could only impose a penalty on the petitioner.

Learned counsel for the petitioner relies upon two decisions of the Division Benches of the High Court in support of his arguments :-

1) Sanjay Saha vs. State of West Bengal

reported in **2019 (3) CHN (Cal) page 1;**

2) Eric John Singh vs. District Magistrate,

Varanasi & Ors. reported in **1988 SCC Online**

Allahabad 911.

Learned counsel appearing for the State submits that power of cancellation and/or revocation of license must be read into the Sarais Act, 1876 by reason of Section 21 of the General Clauses Act, 1897. He also refers to Clause 4 of the lease deed which empowered the State to resume the plot of land if it is used for any purpose other than for which the lease was granted.

I have carefully considered the arguments advanced by the parties.

The District Magistrate has only revoked a license wrongly issued. It is ridiculous to hold that a license that could not have been issued, cannot be revoked. The impugned order must, therefore, be treated as holding the initial license granted to the petitioner as void *ab initio*. The same is not an order of termination/ cancellation of any act or omission post license.

The argument of the petitioner that there has been violation of principles of natural justice, may at the first glance, seem attractive since admittedly, prior no show cause was issued to the petitioner. Indeed it is true that the Sarais Act mandates such prior notice before any act in respect of an existing license. However the same by itself will not be fatal to the order of cancellation.

It is now well settled that the principles of nature justice cannot be put in any straight jacket formula. The petitioner is infact required to demonstrate how non-receipt of notice has prejudiced him. No new fact or document has been produced before this Court that the petitioner may have produced before the ADM. Mandamus cannot be passed directing a hearing where no new evidence is available to the petitioner. The grounds indicated by the petitioner are primarily on questions of law. The issuance of show cause notice to the petitioner was, therefore, a useless formality.

Reference in this regard is made to the decision of the Hon'ble Supreme Court in the case of **State Bank of Patiala & Ors. Vs. S. K. Sharma** reported in **(1996) 3 SCC 364**. At paragraph 33 it was held as follows:

“33. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary enquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departamental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has *normally* to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provisions are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases falling under — “no notice”, “no opportunity” and “no hearing” categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz., whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be

certain procedural provisions which are of a fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the enquiry officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4)(a) In the case of a procedural provision which is not of a mandatory character, the complaint of violation has to be examined from the standpoint of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it, then the order of punishment cannot be set aside on the ground of the said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in *B. Karunakar* [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704]. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/regulations/statutory provisions and the only obligation is to observe the principles of natural justice — or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action — the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between “no opportunity” and no *adequate* opportunity, i.e., between “no notice”/“no hearing” and “no fair hearing”. (a) In the case of former, the order passed would undoubtedly be invalid (one may call it ‘void’ or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e., in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice; in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. [It is made clear that this principle (No. 5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.]

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective

underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest may call for a curtailing of the rule of audi alteram partem. In such situations, the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision.”

It appears clearly to this Court that the license has been obtained by the petitioner by fraud. It is undeniable that the land in question could not have been used for any other purpose than for setting up a manufacturing unit for bakery item, confectionery and packaged food etc. The application dated 7th June, 2021 admittedly does not disclose the lease deed in question. This Court has serious doubts as to whether any application for license could have been entertained by the District Magistrate, had the lease deed being produced along with the application.

The license is therefore rendered void by reason of such fraud. “Fraud unravels all”. Reference in this regard is made to the decision in the case of **A.V. Papayya Sastry v. Govt. of A.P.**, reported in **(2007) 4 SCC 221**. The relevant paragraphs of the aforesaid decision are set out hereinbelow.

“**21.** Now, it is well-settled principle of law that if any judgment or order is obtained by fraud, it cannot be said to be a judgment or order in law. Before three centuries, Chief Justice Edward Coke proclaimed:

“Fraud avoids all judicial acts, ecclesiastical or temporal.”

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order—by the first court or by the final court—has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In the leading case of *Lazarus Estates Ltd. v. Beasley* [(1956) 1 All ER 341 : (1956) 1 QB 702 : (1956) 2 WLR 502 (CA)] Lord Denning observed : (All ER p. 345 C)

“No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud.”

24. In *Duchess of Kingstone*, *Smith's Leading Cases*, 13th Edn., p. 644, explaining the nature of fraud, de Grey, C.J. stated that though a judgment would be res judicata and not impeachable from within, it might be impeachable from without. In other words, though it is not permissible to show that the

court was “mistaken”, it might be shown that it was “misled”. There is an essential distinction between mistake and trickery. The clear implication of the distinction is that an action to set aside a judgment cannot be brought on the ground that it has been decided wrongly, namely, that on the merits, the decision was one which should not have been rendered, but it can be set aside, if the court was imposed upon or tricked into giving the judgment.

25. It has been said : fraud and justice never dwell together (*fraus et jus nunquam cohabitant*); or fraud and deceit ought to benefit none (*fraus et dolus nemini patrocinari debent*).

26. Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of “finality of litigation” cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.

27. In *S.P. Chengalvaraya Naidu v. Jagannath* [(1994) 1 SCC 1] this Court had an occasion to consider the doctrine of fraud and the effect thereof on the judgment obtained by a party. In that case, one A by a registered deed, relinquished all his rights in the suit property in favour of C who sold the property to B. Without disclosing that fact, A filed a suit for possession against B and obtained preliminary decree. During the pendency of an application for final decree, B came to know about the fact of release deed by A in favour of C. He, therefore, contended that the decree was obtained by playing fraud on the court and was a nullity. The trial court upheld the contention and dismissed the application. The High Court, however, set aside the order of the trial court, observing that “there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence”. B approached this Court.

28. Allowing the appeal, setting aside the judgment of the High Court and describing the observations of the High Court as “wholly perverse”, Kuldeep Singh, J. stated : (SCC p. 5, para 5) “The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. *We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.*”

(emphasis supplied)

29. The Court proceeded to state : (SCC p. 5, para 6)

“A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

30. The Court concluded : (SCC p. 5, para 5)

“The principle of ‘finality of litigation’ cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants.”

The next argument advanced by the learned counsel for the petitioner is ingenious. Relying upon the decision of the **Sanjay Saha (Supra)** particularly paragraphs 5 & 6, it is argued

that the ADM could not have relied upon disputes between the Land & Land Reforms Department and the petitioner in respect of the lease. Indeed it has being held in the said decision that the disputes between the owners and keepers of Sarais cannot be invoked by the District Magistrate to pass any order under the Sarais Act. The authorities under the Sarais Act can at the most impose penalty for the acts committed thereunder particularly Sections 11, 12 & 14 of the said Act.

It is also seen that the facts of the said case are rather special and different. In the said **Sanjay Saha (Supra)**, disputes had arisen between two partners and/or joint owners of the Sarais in question that was the subject matter of arbitration. It is in that context that the cancellation of the licence and/or power of the District Magistrate was discussed by the Division Bench. The said decision cannot come to the aid of the petitioner.

The **Eric John Singh (Supra)** decision rendered by the Allahabad High Court, though not binding on this court is worth considering. In the said case, in view of an offence under Section 376 read with Section 109 alleged to have been committed in the Sarais in question and based on communication from the Superintendent of Police, Varanasi, the District Magistrate had cancelled the licence.

The facts clearly indicate that there was no issue touching upon the validity of the licence itself. The case was in respect of an event that occurred of the issuance of license. Reference to paragraphs 5, 10 & 11 of the said decision may to an extent, demolish the argument of Mr. Siddiqui, learned counsel appearing for the State, that the power to cancel must be read

into the power to issue licence under the provisions of the General Clauses Act. This Court does not express any conclusive opinion on the said subject as it is not necessary to do so. The said decision also cannot aid the petitioner.

For the reasons stated hereinabove, the writ petition must fail and is hereby dismissed.

However, costs assessed at Rs.25,000/- shall be payable by the petitioner to the Additional District Magistrate (G), Malda. In default of payment of costs within a period of three months from date, the Additional District Magistrate (G), Malda shall be entitled to recover the said sum of money from the petitioner under the provisions of the Bengal Public Demand Recovery Act.

All parties are to act on a server copy of this order duly downloaded from the official website of this court.

(Rajasekhar Mantha, J.)