IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 4490 of 2022

Niranjan Kundu

Vs.

The State of West Bengal & Ors.

With

W.P.A 5319 of 2022

Amit Roy & Anr.

Vs.

The State of West Bengal & Ors.

For the petitioner : Mr. Abhijit Chakraborty, Adv.

For the State : Mr. Raja Saha, Adv.
Mr. Amit Kr. Ghosh, Adv.
Mr. Debashis Ghosh, Adv.

Last Heard on : 10.11.2022.

Delivered on : 15.11.2022.

Moushumi Bhattacharya, J.

1. The petitioner seeks an injunction restraining the respondent authorities from granting license to the respondent no. 5 in respect of an application under the West Bengal Exercise (Selection of New Sites and Grant of License of Retail Sale and Liquor and Certain Other Intoxicants) Rules, 2003 in

respect of an Foreign Liquor "ON" Shop in the premises situated at 85C, Ultadanga Main Road, Kolkata-67. The petitioner also seeks to restrain the respondent no. 5 from operating the "ON" Shop under the said license.

2. The case sought to be made out by the petitioner is that the license for retail sale of the FL "ON" Shop granted to the private respondent no. 5 is contrary to The Bengal Excise Act, 1909 and the Rules referred to above. According to learned senior counsel appearing for the petitioner, the concerned Excise Department did not make inspection or enquiry after filing of the application for FL "ON" Shop by the respondent no. 5 in 2014. Counsel submits that the NOC for such FL "ON" Shop must be supported by an Enquiry Report submitted by the concerned State respondent. Counsel submits that in any event, the documents on record would show that there was considerable objection by the women residents of the locality to setting up of the FL "ON" Shop. Counsel submits that the Controller of Excise has the power to cancel any application for liquor license in the face of public objection. Counsel further submits that the building where the FL "ON" Shop is located is a commercial building in part and the petitioner resides in this building with his family. Counsel refers to the application made by the private respondent before the Kolkata Municipal Corporation for change of the nature and character of the space demarcated for the FL "ON" Shop business.

3. In answer to the objection to the maintainability of the writ petition, it is submitted that a writ court can exercise inherent jurisdiction under Article 226 of the Constitution to deal with any matter despite existence of an alternative

remedy. Counsel relies on documents to show that the lives of several families in the locality have been disrupted after opening of the FL "ON" Shop.

4. Learned counsel appearing for the State submits that the State Government gave approval to the respondent no. 5 in 2015 for grant of license for FL "ON" Shop. The approval was granted under Rule 4(h) of The West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 (Categories of licenses). Counsel submits that due enquiry was made in terms of Rule 9 (1) of the Rules and the recommendation was made only after satisfaction on the part of the Collector of Excise. Counsel submits that no complaint of public grievance was submitted to the Collector or the Excise Directorate against the grant of license at the said site at the relevant point of time. Counsel further submits that as required under section 19 of the Calcutta Suburban Police Act, 1866 read with section 6 (1) of The Bengal Excise Act, 1909 as amended, the Joint Commissioner of Police, Kolkata issued a police certificate in favour of the respondent no. 5 and the excise license was accordingly issued by the Collector of Excise in favour of the private respondent no. 5 on 10th February, 2022.

5. Learned counsel appearing for the respondent no. 5, Dulal Kundu, submits that the present proceeding is a result of a family dispute between the petitioner who is the brother of the respondent no. 5. Counsel submits that the petitioner does not have any statutory, vested or constitutional right to maintain the present writ petition and further that the writ petition suffers from suppression of material facts. It is submitted that the petitioner participated in hearings before the Commissioner of Excise and the Collector of Excise in

August, 2018 and January, 2019. It is also submitted that the Collector of Excise considered all the objections which are now urged by the petitioner before making the recommendation on 11th December, 2014. Counsel disputes the fact of adverse reports with regard to the operation of the FL "ON" Shop. It is also submitted that several parts of the premises in question are presently being commercially exploited by several entities including the writ petitioner. Counsel also disputes the report of a Sergeant of the Kolkata Police with regard to public objection on the ground that the relevant parts of the General Diary had not been disclosed in the writ petition and that the statutory Police Certificate was issued in favour of the respondent no. 5 on 14th January, 2022 whereas the report relied on by the petitioner was prepared on 30th January, 2020.

6. It is necessary to refer to a few relevant dates for considering the merits of the competing submissions made on behalf of the petitioner, the State and the private respondent. The writ petitioner and the respondent no. 5, who are brothers, jointly applied for grant of Excise License in 2001. The respondent no. 5 again applied for grant of FL "ON" Shop Excise License in 2012 after which the enquiry was made and the respondent no. 5 was informed of the suitability of the site. The license was however not granted to the private respondent in 2012. The respondent appeared in this Court in 2015 for a direction on the Excise Authorities to conclude the process of enquiry. The Collector of Excise thereafter recommended the proposal for grant of Excise License to the respondent no. 5 in December, 2014 and the State Government granted approval for Excise License at the concerned premises on 9th April, 2015. The Collector of Excise passed an ex parte order on 2nd August, 2018 rejecting the prayer for grant of

license in view of the public objections under Rule 9(C) of the 2003 Rules. This order was passed on a complaint made by the petitioner. The respondent no. 5 filed an appeal from the said order and the order of the Collector was quashed by the Commissioner of Excise on 18th December, 2018. The matter was remanded to the Collector for a fresh consideration. The petitioner and the respondent no. 5 were represented in the hearing before the Collector in January, 2019 and the Collector passed an order for grant of approval by the State Government and for Police Certificate. The respondent no. 5 was thereafter asked by the Police Authorities to obtain requisite licenses in relation to fire, food and trade which were duly obtained by the respondent no. 5. The Police Certificate was thereafter issued on 14th January, 2022 and the Excise Certificate given to respondent no. 5 on 10th February, 2022.

7. The above facts show that the petitioner is essentially challenging the order of the Collector of Excise passed on 29th January, 2019. Under Rule 3 of the Consolidated Rules framed under section 85 of the Bengal Excise Act, 1909, an appeal shall lie to the Excise Commissioner from an original or appellate order made by the Collector [Rule 3(a)]. Rule 5 provides that the memorandum of appeal should be presented within one month from the date of the order appealed against. This is an efficacious alternative remedy which the petitioner should have availed of within the statutory time period of one month. It is obvious that since the petitioner failed to avail of the statutory alternative remedy within the stipulated time, the petitioner is seeking to reopen an issue before this Court which is otherwise time-barred. This Court accepts the contentions of the private respondent that the petitioner ought to have taken

recourse of the alternative remedy under the Consolidated Rules for challenging the order of the Collector before the Commissioner of Excise.

8. Even otherwise the writ petition suffers from suppression of material facts. First, the petitioner has failed to disclose that the private respondent Dulal Kundu is the brother of the petitioner. Second, the petitioner has failed to disclose that the petitioner had also applied for grant of Excise License jointly with the private respondent in 2001. Third, the petitioner has also failed to disclose that the petitioner participated in the hearing before the Commissioner of Excise and the Collector of Excise in August, 2018 and January, 2019 after the matter was remanded to the Collector for a fresh hearing. The suppression of the aforesaid facts are material to the adjudication of the relief prayed for and goes to the root of the matter.

9. The objection taken by the petitioner that the private respondent is trying to convert residential premises for commercial purpose is also belied by the documents annexed to the affidavit-in-opposition which show that several parts of the property are being commercially used by individuals residing in the said property. It is also relevant to state that the report of the Sergeant, Ultadanga Police Station dated 30th January, 2020 was much prior to the Police Certificate issued in favour of the respondent no. 5 on 14th January, 2022.

10. There is also substance in the contentions of the private respondent that the petitioner cannot take refuge in a report of January, 2020 alleging inconvenience to the residents of the locality when the grant of Excise License is entirely to be decided by the Authority under The Bengal Excise Act, 1909 and

the Rules framed thereunder. The petitioner has not produced any report after the Excise License was granted to the respondent no. 5 on 10th February, 2022 showing any adverse consequences pursuant to grant of such license. It is also arguable whether the petitioner can maintain the cause of action pleaded in the writ petition in the absence of any constitutional right being infringed.

11. The Police Certificate in relation to an excise shop issued under sections 19 and 20 of the Calcutta Suburban Police Act, 1866 provides that no license shall be granted under The Bengal Excise Act, 1909 unless the person applying for such license has produced a certificate from the Commissioner of Police stating that a license may be granted to him for sale of liquor or intoxicating drug without risk of detriment to the preservation of good order. Section 19 also provides that no license granted shall be renewed without a fresh Certificate obtained from the Commissioner of Police.

12. *State of Punjab vs. M/s. Devans Modern Breweries Ltd.; (2004) 11 SCC 26* has been cited for the proposition that trade in liquor is not a fundamental right and essentially a privilege of the State. This decision however does not assist the petitioner since the private respondent has not claimed such a right for opening of the FL "ON" Shop. The Excise License for the "ON" Shop has, in fact, already been granted to the private respondent on 10th February, 2022 i.e. before filing of the writ petitions in March, 2022. A Single Bench decision in *Clyde Stores Private Limited vs. State of West Bengal; (2006) 2 WBLR (Cal) 733* has been cited for the proposition that existence of alternative remedy is not an absolute bar. It is well settled that an argument of an efficacious alternative remedy is one that has to be decided by the Writ Court on the principal facts

and circumstances of each case having due regard to the principles on which the Court may disregard the existence of an alternative remedy. The special circumstances stand well-defined in several decisions of the Supreme Court and the High Courts, including breach of fundamental rights.

13. In the present case, the petitioner has not been able to show any infringement of fundamental rights or violation of principles of natural justice. The petitioner has been represented in the proceedings before the Collector as well as the Commissioner of Excise. Moreover, having regard to Rule 3 of the Consolidated Rules under section 85 of The Bengal Excise Act, 1909, there is no doubt that the petitioner failed to avail of the remedy provided under the said Rule for preferring a statutory appeal before the Commissioner of Excise. It cannot be said, under any circumstances, that the remedy provided under the said Rule was inefficacious or that the petitioner did not have any other alternative but to rush to the Writ Court for the relief claimed. *Kanthal Bagan Bazar O Byabasayee Samity vs. State of West Bengal; (2010) 1 WBLR (Cal) 59* was a case where the 2003 Rules were not followed in grant of permit for running of an "ON" Shop. The petitioners in that case had complained that the private respondents had been allowed to open a "ON" Shop without a finding whether the 2003 Rules had been followed. The Collector was hence directed to consider the representation made by the writ petitioners and take a decision in the matter in accordance with law. In the present case, there is no evidence that the private respondent has failed to comply with any of the Rules framed. This is also the position taken by the State. Hence, this decision does not support the case made out by the petitioner.

14. This Court is also inclined to accept the position taken on behalf of the State respondents that under Rule 9 (1)(C) of the 2003 Rules, the Collector is under an obligation to consider public grievance which may be submitted to him in this regard before disposing of the proposal for grant of license and after considering clauses A and B namely whether the applicant has furnished the information under A and upon enquiry of the information and documents submitted by a responsible Officer under B. The stage of considering public grievance is as per the sequence laid down in Rule 9(1). The Rules do not provide for any consideration of public grievance after the stage of enquiry that is after clause D of sub-rule (1) of Rule 9 namely after the Collector is satisfied that the proposed site is free from any restriction or objection and that the proposed licensee is eligible to hold an excise license pursuant where to the Collector shall grant a temporary license for a period upto six months.

15. In the present case, the objection shown to the Court was made in 2018 that is three years after the approval was granted in 2015 to the respondent no. 5. Moreover, after the matter was sent back from the Excise Commissioner to the Collector in December, 2018, the latter heard the matter on 15th January, 2019 and 29th January, 2019 whereby it was held that the grant of license could not be withheld on any statutory basis. The required Police Certificate under section 19 of The Calcutta Suburban Police Act, 1866, was also granted in favour of respondent no. 5 on 14th January, 2022 after which the Excise License was issued on 10th February, 2022. The complaint made to the Collector of Excise by the petitioner on 2nd March, 2022 does not follow the statutory Rules;

in any event there is no requirement under the Act or Rules for the petitioner to give any NOC for grant of license to the respondent no. 5.

16. This Court finds no merit in the writ petition in view of the above reasons where the petitioner has sought for injunction restraining the respondent from operating the Foreign Liquor "ON" Shop either on facts or in law. WPA 4490 of 2022 is accordingly dismissed without any order as to costs.

WPA 5319 of 2022

17. In this writ petition, Dulal Kundu in whose favour the license was granted in February, 2022 is the respondent no. 7. The petitioners claim to be residents of the same locality where the FL "ON" Shop of the respondent no. 7 is located. The facts being substantially the same, there is no reason to come to a different factual conclusion in this writ petition. There is nothing on record to show that the petitioners complied with the sequence laid down in Rule 9(1)(C) of the 2003 Rules or that they made any complaint in the nature of public grievance which the Collector was required to consider before grant of temporary license to the private respondent.

18. The decision in the present writ petition would hence be the same as that in WPA 4490 of 2022. The writ petition is dismissed accordingly.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(**Moushumi Bhattacharya, J.**)