

CASE NO.:
Appeal (civil) 4564 of 2006

PETITIONER:
Commissioner Excise & Anr

RESPONDENT:
Manoj Ali & Anr

DATE OF JUDGMENT: 19/10/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G M E N T

[Arising out of S.L.P. (Civil) No. 13157 of 2006]
W I T H
CIVIL APPEAL NOS.4566, 4568 & 4567 OF 2006
[Arising out of SLP (Civil) Nos.13240, 13329 & 13729 of 2006]

S.B. SINHA, J :

Leave granted.

Wholesale and retail licences for Indian Made Foreign Liquor (for short, 'IMFL') and Beer for the District of Bikaner for the year 2004-05 were given to one Rampal Rajkishan. It had its wholesale and retail godown near Old Cold Storage, Tulsi Circle, Bikaner. The said licensee submitted a plan of the premises to be used as a wholesale godown. It came to an end on 31.03.2005. With a view to grant retail and wholesale licences both for country liquor and IMFL, tenders were invited by Appellants herein. Respondent was found to be the highest bidder. His tender was accepted. Licences were granted to him. He proposed to occupy the same premises which had been taken on rent by the erstwhile licensee. Before commencement of his business in terms of the said licences, he submitted the same plan of the premises for carrying out his business. Indisputably, the plans submitted by Rampal Rajkishan and Respondent were identical. An Excise Inspector conducted a purported inspection of the wholesale and retails godown of Rampal Rajkishan on expiry of the period of licence. He purportedly has shown in his report that no stock of liquor was available.

It has, however, not been disputed that although the erstwhile licensee was under a statutory obligation in terms of Rule 22 to make a declaration as to whether any stock was held by him, as on 31.03.2005, the same was not complied with. A provisional licence was issued to Respondent. He took delivery of some IMFL products also. A permanent licence, however, was granted on 27.04.2005. In the meanwhile, a purported raid was conducted in the premises. From one of the rooms a large number of bottles of different sizes were found. They were seized. On the premise that the room in question was in possession of Respondent herein, a criminal proceeding was initiated against him. A show cause notice was also issued on 27.04.2005 as to why his licences should not be cancelled. Indisputably, inspection was carried out both on 31.03.2005 and 11.04.2005 in the absence of Respondent or his employees. Curiously, the Inspector who purported to have carried out the inspection of the godown of the erstwhile licensee himself pointed out that unauthorized excisable articles were to be found in a room. In the cause shown by Respondent in response to the show cause notice issued in that behalf, a stand was taken by him that the bottles of liquor recovered from the said room had been in possession of the erstwhile licensee. He had appointed a Chowkidar for the said purpose. It was categorically stated in

his reply :

"4. That when the said Godown was taken for rent by the Applicant a room where Ex contractor had kept English Liquor and Beer, was not given in the possession of the Applicant. The Applicant had no direct or indirect concern with this liquor and the Beer.

5. That the Ex. contractor had left with the keys of the Godown keeping us in dark without the knowledge of the Department of Excise. Despite our efforts he was not available as the Ex. Contractor being from out of Rajasthan State (from State of Haryana) could not be contacted. The Department of Excise Bikaner falsely proceeded against me in order to suppress its fault, as the remaining stock of foreign liquor and beer of Ex contractor should have been under rule taken possession of at 11.00 P.M. on 31.3.2005."

A further show cause notice was issued on 13.05.2005 as to why his licence for wholesale trade of IMFL and Beer and for the trade of country liquor should also not be cancelled in view of the conditions No. 9.2 and 9.3 of the country liquor licence and condition no.17 of the IMFL licence.

He replied to the said show cause notice on 28.05.2005 raising similar contentions.

The Commissioner of Excise directed cancellation of Respondent's licence holding that as indisputably a large number of bottles of IMFL and Beer, which neither contained the hologram, nor any maximum retail price mentioned on the labels, were recovered from a room which was within the premises shown to be in his possession, he had violated the conditions of the licence, stating :

"\005Therefore, storage of the stock of this liquor and Beer recovered from the Godown of Non-Applicant is absolutely illegal and is violation of the terms of the permit of the whole sale shops of foreign liquor. Thus, both the facts have not been denied by Non-Applicant Sh. Manoj Ali that the place of recovery of the illicit liquor was a part of the Godown sanctioned to him and it is not disputed even that the entries of the stock recovered were not found in his stock Register. He is thus liable for a thing found in the Godown sanctioned to him and on this ground the case U/s 19/54 of Rajasthan Excise Act read with section 58 (c) of the Act has been registered against the Non Applicant Sh. Manoj Ali\005"

An appeal thereagainst preferred by him before the Board of Revenue, however, was allowed, opining :

"\005When the licensee has the case that if batch No. of the stock recovered and seized had been checked it would have been established that recovered stock had been lifted by the previous licensee from a Brewery/Distillery under the permit granted by the Department. It would be clear from it as to what Batch Nos. were mentioned in the Bill/Invoice issued by Distillery Brewery so that by tallying them with the Batch No. stated on the recovered liquor it would have been proved that the recovered liquor had been issued to the previous licensee. It should have been tallied with the stock and issue Registers also.

If it had been checked the position would have become clear whether the stock had been obtained by the previous licensee under a permit or not or whether it was entered in the stock and issue Registers or not. In case in checking such entries had not been found was not the liquor supplied to the previous licensee only that the charge of keeping illicit liquor could have been established against the existing licensee. When clear and particular statement has been made by the licensee in his statement it was required to conduct thorough enquiry for even departmental action under the provisions of the Act which was not done by the Subordinate Court. Simply on receipt of the counter it passed the order to cancel the license on the basis of summary proceeding which is not just. Registration of a crime does not mean that the guilt has been proved against the licensee and he should be punished by canceling his licence. It on the said enquiry it had been found that it was the stock left by the previous licensee under the permit and it is entered in his stock register and issue register the recovered stock remained lying from 1.4.2005 to 11.4.2005 to accomplish certain ulterior motive because of carelessness of the Department Officers and in order to avoid to pay the Revenue by the previous licensee, to the extent that the posted concerned Inspector did not inspect the Godown during this period even though it was responsibility of the Inspector."

The matter was remanded back to the Commissioner of Excise asking him to pass a 'justified judgment' keeping in view the observations made therein and after probing all the facts and records in respect of the case and after giving sufficient opportunity of adduction of evidence to the licensee.

Both the Commissioner of Excise and Respondent preferred writ petitions before the High Court questioning the legality of the said order. Whereas the writ petition filed by Appellants was dismissed, inter alia, on the ground that the State had not preferred any appeal, the writ petition filed by Respondent was allowed, holding that there was no justification for cancellation of either of the licences and in particular the one for dealing in country liquor.

A Division Bench of the High Court in an intra-court appeal modified the judgment of the learned Single Judge holding the judgment of the Board of Revenue should have been upheld in its entirety and dismiss the writ petitions filed by both the contractor as also by the Department, directing :

"In the result, the order of the learned single Judge is modified to the extent that quashing of the orders of the Excise Commissioner dated 30.5.2005 and 28.6.2005 would stand but subject to enquiry followed by a fresh order to be passed by the Excise Commissioner in accordance with law as directed by the Board of Revenue by its order dated 6.7.2005. The writ petitions preferred by the department as well as the contractor would stand dismissed."

Special Leave Petitions were filed by both the parties before this Court. In view of the stand taken by both the parties that the matter should not have been remitted to the Commissioner of Excise, this Court set aside the said order with a request to the High Court to consider the matter afresh on merits. The Division Bench of the High Court by reason of the impugned judgment has upheld the judgment and order passed by the learned Single Judge. The Commissioner of Excise and the State are in appeal before us.

Before the High Court the erstwhile licensee had filed an affidavit. Affidavit had also been affirmed by the Chowkidar. The High Court gave an opportunity to Appellants to produce documents.

On elaborate discussions of all the contentions raised before the High Court, the Division Bench held that Respondent was not at fault. However, having regard to the fact that the period of licence had expired, the direction to forfeit the security and the license fee was held to be unsustainable and the same was directed to be refunded to the contractor. As regards the claim of the contractor for damages by way of loss of profit, it was held that the same may be the subject-matter of separate suit for damages.

A short question which arises for consideration before us is as to whether in the peculiar facts and circumstances of the case, Respondent can be said to have violated the terms and conditions of the licence granted in his favour.

Mr. Gopal Subramaniam, the learned Additional Solicitor General appearing on behalf of Appellants, has taken us through the entire records and questioned almost each and every finding of the Division Bench. It was submitted that even assuming that the findings of the Board of Revenue and the learned Single Judge of High Court to the effect that the bottles of IMFL were recovered from the premises belonging to the erstwhile licensee were correct; in view of the fact that Respondent was in possession and control of the premises, he must be held to have violated the terms and conditions of the licence and thus no illegality can be said to have been committed by the Commissioner of Excise in directing cancellation of licence and consequently forfeiture of the amount of security.

Mr. S. Ganesh, the learned Senior Counsel appearing on behalf of Respondent, on the other hand, contended that the High Court has proceeded to determine the issues on concession made by the learned counsel appearing on behalf of Appellants and they should not be permitted to resile therefrom. According to the learned counsel, Respondent cannot be penalized for no fault on his part and violation of the terms and conditions of the licence by the erstwhile licensee.

Clauses 9.2, 9.3 and 22 of the licence read as under :

"9.2 If the officer issuing the permit or a higher authority has a belief at any time that the permit is not keeping his shop running or is not running it properly or is directly or indirectly involved in evasion of excise duty and other excise charges or for any proper and sufficient reasons in that case his permit may be cancelled.

9.3 During the period of a permit if a crime is registered or he is convicted for the offence under the Rajasthan Excise Act, 1950, Narcotics Drugs and Psychotropic Substances Act, 1985 or under the Acts mentioned in Section 34 of the Excise Act 1950 and under the section mentioned therein the permit may be cancelled.

22. In a case of expiry of the period of the license or cancellation of the license due to any other reason, the licensee shall have to communicate the information about the remaining stocks of IMFL and Beer and all the records, immediately to the Excise Inspector of his area. Entire records will have to be deposited by him in the office of the Excise Inspector, immediately. Up to disposal, the remaining stocks in balance, shall be stored as

such place in the joint supervision of the Excise Inspector and the previous licensee, where the trade was being carried out, and up to the disposal, the rent, electricity expenses and any other surcharges etc., shall be payable to the previous licensee himself. The balance stock could be transferred to the new licensee or would be disposed off by the department through the prescribed procedure, but the outgoing licensee shall not be entitled to receive back the amount of any kind of fees etc. remitted against the stock. But the outgoing licensee will be entitled and shall have right to the cost of the goods recovered by the disposal and the duty inherent in the stocks."

Section 34 of the Rajasthan Excise Act, 1950 reads as under :

"34. Power to cancel and suspend licences.-(1) Subject to such restrictions as the State Government may prescribe, the authority granting any licence, permit or pass under this Act may cancel or suspend it \026

(a) if it is transferred or subject 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 of such licence, permit or pass or by his servant or by anyone acting on his behalf with his express or implied permission, of any of the terms or conditions of such licence, permit or pass; or

(d) if the holder thereof is convicted of any offence punishable 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 any offence punishable under the Dangerous Drugs Act, 1930 (Central Act 11 of 1930) or any law relating to merchandise marks or of any offence punishable under sections 482 to 489 (both inclusive) of the Indian Penal Code; or

(e) where a licence, permit or pass has been granted on the application of the grantee of an exclusive privilege under this Act, on the requisition in writing of such grantee; or

(f) if the conditions of the licence, permit or pass provide for such cancellation or suspension at will.

(2) When a licence, permit, or pass held by any person is cancelled under sub-section (1), the authority aforesaid may cancel any other licence, permit or pass granted to such person under this Act or any other law for the time being in force relating to excise, revenue or under the Opium Act, 1878 (Central Act 1 of 1878).

(3) The holder of a licence, permit or pass shall not be entitled to any compensation for the cancellation or suspension thereof under this section nor to a refund of any fee paid or deposit made in respect thereof."

Certain facts are not disputed. The same premises which were the subject-matter of the plans submitted by Respondent herein were being occupied by the erstwhile licensee. Indisputably, he had been carrying on his business under valid licences granted in his favour. A large number of bottles of IMFL liquor were found in one of the rooms in the said tenanted premises, which were being used by him for his retail business. He did not issue any declaration in terms of Rule 22 referred to hereinbefore. No physical verification had been made. A certificate was issued by the Inspector, the genuineness whereof is open to question. The High Court on appreciation of the entire evidence had made terse comments in regard to the conduct of the said Inspector. The said certificate issued by him in regard to the purported verification of the stock held by the erstwhile licensee as on 31.03.2005 is also seriously open to question. Respondent was given a provisional licence. He had been given a permanent licence only on 27.04.2005. He had paid a huge amount towards licence fee and more than Rs. Four Crores by way of security. Some stock was released in his favour on 08.04.2005. In effect and substance, he was yet to start his business. The raid in the premises conducted on 11.04.2005. A show cause notice had been issued on the premise that the subject-matter of seizure was the stock owned and possessed by Respondent. Before the High Court, however, Appellants had taken a different stand. In view of the affidavits of the partner of the erstwhile licensee as also another employee and the Chowkidar, not only the ownership of the seized liquor was admitted, but it was also accepted that the entire excise duty in respect of the said quality of liquor had been paid by the former licensee. The fact that keeping in view the batch numbers and other particulars, the stock had been released in favour of the erstwhile licensee is yet again not in dispute.

One of the contentions, which has, however, been raised is that Respondent had not informed the department that he had not been able to obtain possession of one of the rooms which was being used by the erstwhile licensee for vending IMFL and Beer in retail.

Initiation of a proceeding for cancellation of a licence leads to serious consequences. The Commissioner of Excise is a statutory authority. The officers of the excise department although are duty bound to oversee strict observance of the terms and conditions of licence as also the provisions of the Excise Act and the rules framed thereunder by the licensee, their conduct should be above board. Exercise of a statutory function cannot be and should not be arbitrary and capricious. It may not be on whims and caprice. The action on the part of the statutory authority, it goes without saying, should be bona fide.

We have noticed hereinbefore that the authorities did not insist upon the erstwhile licensee to carry out his statutory obligations in terms of Rule 22 of the Act. We fail to understand as to how in absence of such a statutory declaration, a purported certificate was issued by the Inspector. The report prepared by him was contained in an inter-departmental correspondence. The High Court had doubted the bona fide of the Inspector in view of his conduct, which has been brought on records. We agree with its observations. The findings of the High Court are based on two affidavits, one affirmed by Rampal on behalf of the firm M/s Rampal Rajkishan and another by Rajkishan. The categorical admission made by them that the seized stock was forming the balance stock held under their licence and they had not delivered possession of the room to Respondent has been accepted by the High Court. The High Court furthermore has accepted the affidavit of Naresh Kumar, who was appointed as a watchman on behalf of the previous licensee. The Chowkidar has also categorically stated that his employer did not hand over possession of the entire premises to Respondent. An unequivocal statement was made by him in the affidavit that the stock of the previous licensee had still been lying in the said premises till 11.04.2005, although an authorized departmental official should have taken over the stock from his possession immediately after 31.03.2005.

The notices dated 27.04.2005 and 13.05.2005 did not pertain to the

intended cancellation of the country liquor licence. The High Court had noticed that on the same day i.e. 13.05.2005, the Additional Commissioner, Rajasthan Excise, Bikaner wrote to the District Excise Officer inviting his attention to the application of the contractor enclosing therewith the aforementioned affidavit of Naresh Kumar. The said letter was not responded to by the District Excise Officer until after decision of the Board of Revenue on 06.07.2005.

The Division Bench itself compared the plans of both M/s Rampal Rajkishan and Respondent. They were found to be identical. It was noticed that the plan was submitted by Respondent before he started his business. It was held :

"From the comparison of three site plans Schedule \026 A, B and C, they leave no room of doubt that IMFL and beer bottles without hologram and MRP was recovered from that part of the plan submitted by the respondent contractor for approval which was formerly approved as retail godown of IMFL and beer for the period from 17.6.2004 to 31.3.2005."

Admission made on behalf of Appellants before the High Court is also explicit, which the Division Bench of the High Court recorded in the following terms :

"In pursuance of our specific query during the course of hearing, it was clearly stated by the learned counsel for the Excise Department that not it cannot be disputed that the recovered stock of IMFL and beer was authorizedly issued to the previous licensee and was part of the same issue."

Before the High Court there was no dispute that stock recovered from the disputed premises had been issued to the previous licensee before 31.03.2005. Evidently, thus, it was the balance stock that remained in its hands which had not been surrendered or accounted for.

It is unfortunate, as has been observed not only by the Division Bench of the High Court but also by the Board of Revenue as also the learned Single Judge, that the Commissioner of Excise did not bestow any serious attention to the contentions raised by Respondent, which was required to be done. The statement of Respondent may be a self-serving statement; but when a statement was made which was supported by sufficient evidence, it was obligatory on the part of the authorities of the Excise Department to take into consideration the same. It was the solemn duty on the part of the excise authorities of the State to undertake an exercise of verification of stock. For reasons best known to them, they chose to hurry through the process of cancellation of both the licences of Respondent, although there has been no violation of the terms and conditions of the licence granted to Respondent at least in relation to the licence in respect of country liquor.

Having regard to the materials brought on records, the Board of Revenue, the learned Single Judge as also the Division Bench satisfied themselves that Respondent did not receive vacant possession of that part of the premises from which IMFL and Beer bottles without hologram and MRP tags were recovered. Once it was held that the room in question was in possession of the erstwhile licensee, penal action should have been taken against him and not against Respondent.

As regards the purported inspection report whereupon the learned Additional Solicitor General laid great emphasis, the High Court opined :

"Nothing has been stated by the appellants at any

stage whether the records of previous licensee was surrendered to authority at the expiry of period of licences and whether stock position tallied with the register. It is the basic requirement under the licence that at the close of licence the licensee shall surrender all registers required to be maintained and the Excise Authorities are required to verify the correctness of stock as per register with physical verification. In absence of such verification with record, the conclusion cannot be drawn that at the close of licence the licensee has disposed off all the supplies made to it and nothing remained in stock. This is firmly established from the facts of the case that while inspector purports to have reported stock supplied to previous licensee to be nil, yet huge quantity of IMFL/beer bottles supplied to previous licensee remained undisposed off and found to be lying in the very same premises where they ought to have been at the close of licence until its disposal by the Excise authorities in accordance with law. Until verification of balance stock with register is made, no presumption of correctness of reports submitted by the inspectors in the circumstances of the present case can be drawn. Reference in this connection can be made to clause 22 of licence issued to previous licensee which supports the above conclusion."

It was further observed :

"\005Even from the admitted position, it was not possible to have removed such a large quantity of liquor from the place of its search until 31.03.2005 and then to bring it back to the same place. In ordinary course of human behaviour also, it would not have been conduct or removing and bringing it back because continued storing in the same premises of balance stock was otherwise justified under the terms of licence of previous licensee."

Analyzing the purported stock report, the High Court was of the view :

"While the wholesale stock register were brought before the Court for perusal to suggest that stock as per the whole stock register was Nil as on 28.3.2005, but no such attempt was even made in respect of retail licence. The records about the retail licence were not referred to us nor it was asserted that the retail stock register and other record of retail licence was delivered to the Excise Department by the previous licensee or is in their possession and the stock position was verified. In fact, that cannot be in view of admitted position that stock of IMFL/beer seized on 12.4.2005 was part of supplies made to previous licensee authorisedly.

The report of the search party is conspicuously silent about the fact that substantial part of IMFL seized on 11.4.2005/12.4.2005 is manufactured out of rectified spirit which was prohibited to be sold in the market under the new Excise policy, 2005-2006. Notwithstanding this fact was brought to the notice by the contractor in his defence, the Commissioner also did not take notice of this fact. Obviously, this fact explains the conduct of the previous licensee. On wholesale licence credit is taken on excise duty paid on supplies received by him when the same is remained to retail vend and excise duty becomes

payable by the retail vendor as and when it disposed it off. However, on the balance stock, at the end of the licence, he becomes liable to pay excise duty on such balance stock. Since stock was not transferable to new contractor as per the new policy and no recovery of that amount was possible and liability to pay excise duty was to fall on the previous licensee and unless the stock left with previous licensee are surrendered and accounted for in terms of the licence, they continued to remain in the same premises, where the licensee was authorized to conduct his business. The fact corroborate the stand taken by the current contractor that IMFL/beer bottles recovered from the disputed premises were part of the supplies made to previous licensee who has left the place without surrendering the stock and same remained stored in the premises where from he was authorized to conduct his trade. The possession of such premises never came to the new contractor could not be said to have come in conscious possession of the liquor recovered from the disputed premises."

The High Court noticed the conduct of Hajja Ram, Inspector, in the following terms :

"\005We have also noticed from the record that Hajja Ram was the person who is alleged to have reported on 31.3.2005. He is the person who is called by the Deputy Excise Superintendent to be present at the time of search on 11.4.2005. He is the person who is appointed mother (sic) and he is the person who during the search instigate about the opening of close room with shutter lock by asserting that unauthorized excisable articles are to be found therein are strongly suggestive of the fact that it was in know of the Inspector that stock of previous licence stored in the approved premises was lying therein. The fact that current contractor has submitted the plan of the whole premises; which was originally submitted by the previous licensee for approval, it is highly probable that he got the contractor unaware about the fact of huge quantity of IMFL and beer lying therein. Apparently, it is not the case of the Department that the previous licensee has ever accounted for balance remained with him. When the recovered stock was part of the excisable articles issued to the previous licensee, until the same has been accounted for by him and were available for acquisition by others there cannot be any presumption against the subsequent contractor. We are of the opinion that in absence of such link evidence having been established that there was conscious transfer of excisable articles in favour of subsequent licensee, he could not have been held liable for the recovery of said articles from the premises which were approved in favour of the previous licensee for conduct of his business."

A presumption in law as was urged by the learned Additional Solicitor General could have been raised to the effect that the stock belonged to Respondent, but in view of the materials on records, the said presumption stood rebutted. It may be reiterated that now it has not been disputed that the goods were supplied to the erstwhile contractor. He had paid the excise duty. Moreover, he categorically admitted that the excise articles were in his possession. The said goods had not been transferred to the new licensee. Appellants conceded before the High Court in regard thereto. Once Appellants admit the aforementioned facts, it was not necessary even for

Respondent herein to prove his innocence by adducing any further evidence. Things admitted need not be proved.

Existence of Mens Rea in a case of this nature would be an essential ingredient for forming an opinion that licence validly held by a person should be cancelled. Forfeiture of the amount of security should not be held to be a logical conclusion on cancellation of licence. Licences should not be directed to be cancelled only because there has been some technical violation on the part of the licensee.

The fact that Respondent for all intent and purport had not been allowed to carry on any business is of some significance. Even why the directions of the Board of Revenue were not carried out and the Commissioner of Excise filed a writ petition is beyond comprehension.

Although the State of Rajasthan is before us now, it did not join the Commissioner of Excise before the High Court. It became wiser only after dismissal of the writ petitions. In any view of the matter, the doctrine of proportionality should have been invoked. Appellants should not, in our considered opinion, be permitted to forfeit a huge sum of money legitimately belonging to Respondent on a technical plea that he should have informed them that he had not obtained the possession of a part of the tenanted premises.

The affidavit might have been filed before the Division Bench of the High Court, but no objection thereto was taken. In fact, as noticed hereinbefore, Appellants themselves urged before this Court that the entire matter on merits should be determined by the High Court. Having lost before the Board of Revenue, the learned Single Judge and the Division Bench, Appellants cannot now ask us to interfere with the findings of facts. Even otherwise, there is no justifiable reason to do so.

We have been taken through the judgments of the Board of Revenue, learned Single Judge as also the Division Bench and other materials and we are satisfied that the findings arrived at by them are correct. We have, therefore, no hesitation in coming to the conclusion that there is no merit in these appeals. They are dismissed accordingly.

Appellants hereby are directed to refund the entire amount of security within a period of four weeks from today, failing which the same shall carry interest @ 12% p.a. till actual payment. Appellants must also pay and bear the cost of Respondent in these appeals which is quantified at Rs.1,00,000/- (Rupees one lakh only).