

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4965 OF 2009

[Arising out of Special Leave Petition (Civil) No. 4563 of 2008]

MUKESH KUMAR AGRAWAL

... APPELLANT

Versus

STATE OF U.P. & ORS.

... RESPONDENTS

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. Appellant is before us aggrieved by and dissatisfied with a judgment and order dated 4.2.2008 passed by a Division Bench of the High Court of Judicature at Allahabad in Writ Petition No. 5255 of 2008 whereby and whereunder the writ petition filed by the appellant questioning the validity of a judgment and order dated 9.1.2008 has been dismissed.

3. Appellant was a dealer in High Speed Diesel Oil and Light Diesel Oil. Business in the said commodity is governed by the U.P. High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981 (for short, "1981 Order"). The said 1981 Order has been framed in terms of Section 3 of the Essential Commodities Act, 1955. Appellant was granted a licence for dealing in the said commodities in terms of the said 1981 Order on or about 1.4.1990, which was renewed till 31.3.2010. Indisputably, on the premise that he had violated the terms and conditions of the said licence, the Licensing Authority by reason of an order dated 22.6.2002 cancelled the said licence.

Appellant preferred a writ petition thereagainst in the High court. By an interim order dated 9.7.2002, the operation of the order dated 22.6.2002 was stayed. During pendency of the said writ petition, the order of cancellation of licence was confirmed by the District Magistrate on 28.3.2003. Another writ petition came to be filed by the appellant on 7.4.2003 in the High Court and the said order dated 28.3.2003 passed by the District Magistrate was also stayed.

Indisputably, again on 24.10.2007 and 8.11.2007, raids were conducted on the appellant's establishment by the Weights and Measures Department, Lucknow and Food Cell of Office of Additional Commissioner, Food and Civil Supplies, U.P. In the said raid, 3178

liters of High Speed Diesel Oil were found to be in excess. A show cause notice was issued on or about 13.11.2007 asking the appellant to show cause as to why his licence should not be cancelled. A First Information Report (FIR) was also lodged on 14.11.2007 purporting to be for violation of Sections 3/7 of the Essential Commodities Act, 1955 as also the provisions of the 1981 Order.

Appellant filed a Criminal Misc. Writ Petition for quashing the FIR lodged against him. In the said proceedings, the High Court stayed the order of his arrest.

The District Supply Officer by his order dated 9.1.2008 cancelled the licence of the appellant. Questioning the said order, appellant filed a writ petition inter alia on the premise that the allegations contained in the show cause notice were different from those made in the FIR insofar as the notice did not specify that any sale through unauthorized persons had taken place.

By reason of the impugned judgment, the said writ petition has been dismissed by the High Court opining that the appellant has an alternative remedy.

4. Mr. Rakesh Dwivedi, learned Senior Counsel appearing on behalf of the appellant would contend that the High Court committed a manifest error in passing the impugned judgment insofar as it failed to take into consideration that the very fact that the appellant's establishment had

repeatedly been raided by way of political vengeance for which he had to move the High Court again and again is itself a pointer to the fact that the entire proceeding against him was mala fide having been initiated at the instance of the Minister who was a political rival as the appellant had fought an election against him. Learned counsel would contend that the existence of alternate statutory remedy by itself cannot be a ground for dismissing a writ petition summarily as it is well known that when an order is passed without jurisdiction, existence of alternative remedy would not be a bar for maintaining the same.

5. Mr. Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the respondents, however, would support the impugned judgment.

6. It is no doubt true that the appellant in his writ petition has made out a case of malice against one Shri Ramveer Upadhyay, Cabinet Minister for Power/Energy. The High Court by reason of the impugned judgment opined that although the said Shri Ramveer Upadhyay contested an election against the appellant in the years 2002 and 2007, the allegations of mala fide were vague in nature. It was furthermore opined by the High Court that the averments made in the writ application in regard to the malice of fact against said Shri Ramveer Upadhyay were not supported by any material which would lead to a finding of malice against him.

7. Appellant indisputably was holder of a licence granted to him in terms of the provisions of the 1981 Order. Clause 16(1) of the of the 1981 Order obligates the licensee to display a stock of price board at his business premises showing opening balance of High Speed Diesel Oil or Light Diesel Oil and the rate per liter as also the closing balance recorded at the end of the day. Clause 14 of the conditions of the licence mandates a licensee to maintain a stock register. The contention of the appellant is that he did not hold any stock of High Speed Diesel Oil in excess, as he had received 3000 liters of diesel at about 12:00 p.m. on 8.11.2007, that is, before the raid was conducted. From a perusal of the show cause notice, however, it appears that the allegations against him was that he had stored 8300.47 liters of diesel in the underground tank, whereas according to the Tank Calibration Chart measuring 83 centimeters, the amount of diesel oil stored therein was calculated at 7523.05 liters.

8. Appellant in his writ application had inter alia contended that he had not been given a copy of the inspection report at the spot. Furthermore it is contended that the District Supply Officer had proceeded against him with a pre-determined view.

9. It is true that ordinarily a writ petition cannot be dismissed summarily when the allegations made in the writ petition inter alia make out a case that the order and/or action taken therein was wholly without

jurisdiction and/or in violation of the principles of natural justice as has been held by this Court in Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors. [(1998) 8 SCC 1], but, in our considered opinion, in the present case no such case has been made out.

10. There cannot be any doubt or dispute whatsoever that the authorities of the Weights and Measures Department as also the Food Cell of Office of Additional Commissioner, Food and Civil Supplies, U.P. were entitled to inspect the business premises of the appellant and carry out searches. Indisputably again, possession of higher quantity of diesel oil than that has been shown in the stock book would amount to contravention of the provisions of the licence and/or licensing Order. The appellant in invoking the writ jurisdiction of the High Court Order raised contentions involving disputed questions of fact. Ordinarily, the disputed questions of fact are not determined in a writ petition. We would, however, hasten to add that the same would not mean that the High Court cannot exercise its discretionary writ jurisdiction for determination of disputed questions of fact or only because some dispute had been raised in the writ proceedings itself the same would deter the High Court from exercising its jurisdiction. The appellant has raised pure questions of fact for determination in the writ proceedings in respect whereof the Licensing Authority itself was required to go into the materials brought on record by both the parties. It is neither denied nor disputed that the

order passed by the Licensing Authority cancelling the licence of a dealer is an appellable one. The Appellate Authority is entitled to go into the questions of both law and fact. The High Court, therefore, in our opinion, cannot be said to have committed any error in refusing to entertain the writ petition. It is, thus, not a case where the ratio laid in Whirlpool (supra) is applicable.

11. There cannot furthermore be any doubt or dispute that the court can go into the question where malice of fact is alleged. (See Pratap Singh v. State of Punjab AIR 1964 SC 72)

12. The High court, however, upon considering the averments made in the writ petition, as noticed hereinbefore, found that the allegations of malice made therein are vague in character. The appellant, thus, was entitled to raise all his contentions including the aforementioned contention before the authorities under the 1981 Order.

We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved. [See Swaran Singh Chand v. Punjab State Electricity Board 2009 (7) SCALE 622)]

13. For the aforementioned reasons, the appeal is dismissed with costs.

Counsel's fee assessed at Rs.10,000/-.

.....J.
[S.B. Sinha]

.....
.....J.
[Cyriac Joseph]

New Delhi;
July 31 , 2009