

Bishnu Ram Borah and Another

Vs

Parag Saikia and Others

Civil Appeal No. 5742 of 1983

(A. Varadarajan, A. N. Sen, V. B. Eradi JJ)

16.11.1983

JUDGMENT

A. P. SEN, J. -

1. This appeal by special leave directed against the judgment and order of the Assam High Court dated November 4, 1982 concerns the propriety of the grant of a liquor licence. By the judgment the High Court quashed an order of the Board of Revenue dated February 11, 1982 affirming the grant of licence in respect of Jorhat Country Spirit Shop No. 1 made by the Deputy Commissioner, Sibsagar, Jorhat, by his order dated August 28, 1981, and instead of remitting the matter to the Board of Revenue for a decision afresh, the High Court directed the Deputy Commissioner to settle the liquor shop with respondents 1 and 2 for the remaining period of the grant up to March 31, 1984.
2. The short question that arises in the appeal is whether it was proper exercise of jurisdiction by the High Court under Article 226 of the Constitution to have issued a writ of mandamus ordaining the Deputy Commissioner to grant the liquor licence. Further, a question arises whether it was impermissible for the High Court to have embarked upon an inquiry into the facts and on a reappraisal of the evidence come to a finding contrary to that reached by the Board of Revenue based on appreciation of evidence that one set of rival claimants i.e. Parag Saikia and Prafulla Barua, respondents 1 and 2 were entitled to grant of such privilege in preference to the appellants under the Note beneath Rule 223(2) of the Assam Excise Rules, 1945 (for short 'Rules')
3. The facts of this case present a rather disturbing feature. Jorhat Country Spirit Shop No. 1 is a big excise shop within the meaning of Rule 232 of the Rules. Under clause (a) thereof, the settlement of such a country liquor shop has to be made with a pair of tenderers constituting two or more partners. Five joint tenders were received in response to the notification issued by the Deputy Commissioner, Sibsagar, Jorhat calling for tenders of the country liquor shop for the financial year 1983-84. The Deputy Commissioner, Sibsagar, Jorhat in consultation with the Advisory Committee constituted for that purpose as required under Rule 208 by his order dated August 28, 1981 settled the shop with the two appellants Bishnu Ram Borah and Bipin Chandra Borah. One set of the unsuccessful tenderers were respondents 1 and 2 Parag Saikia and Prafulla Barua. Of the, Parag Saikia respondent 1 herein was held by the Deputy Commissioner to be a mere benamidar of a prominent businessman of Dibrugarh while respondent 2 Prafulla Barua was a student studying for his B.Sc. degree and staying in a hostel at Golaghat, which is a place some 30 miles away from Jorhat. The Board of Revenue, Assam by its order dated February 11, 1982 upheld the settlement of the country liquor shop with the appellants. Being aggrieved by the decision of the Board, two sets of unsuccessful tenderers viz. respondents 1 and 2 and the interveners Daya Ram Borah and Prabin

Kumar Borah filed petitions under Article 226 of the Constitution before the Assam High Court being Civil Rule Nos. 215 of 1982 and 1163 of 1982. The High Court instead of taking up both writ petitions together, heard and decided the writ petition filed by respondents 1 and 2 by its judgment dated November 4, 1982 quashed the order of the Board of Revenue and remitted the appeal to the Board for a decision afresh in the light of the observations made by it. The Board however by its order dated December 3, 1982 maintained the settlement of the country liquor shop with the appellants. Thereupon, respondents 1 and 2 again moved the High Court under Article 226 for appropriate writ, direction or order in the matter of grant of the liquor licence. The High Court by its judgment dated May 7, 1983 quashed the order of the Board of Revenue and instead of remitting the matter to the Board for a decision afresh, issued a writ of mandamus by which it directed the Deputy Commissioner to settle the liquor shop with respondents 1 and 2 the remaining period of the grant up to March 31, 1984. While making the direction the High Court observed that "in case it was found that respondents 1 and 2 were benamidars of anybody, it would be open to the settling authority i.e. the Deputy Commissioner to cancel the liquor licence". Further, it observed that "the grant would be subject to the result of the decision in the writ petition filed by the interveners i.e. Civil Rule No. 1163 of 1982."

4. Before proceeding further, it is necessary to refer to certain provisions of the Assam Excise Act, 1910 (for short 'Act') and the Assam Excise Rules, 1945 (for short 'Rules') as amended from time to time. Section 18(1) of the Act provides :

18. (1) Prohibition of sale without licence, and the exceptions to such prohibitions. - No intoxicant shall be sold except under the authority and in accordance with the terms and conditions of a licence granted by the authority prescribed in the rules framed under this Act.

Rule 208 provides as follows :

Advisory Committee. - The Collectors should make settlements in consultation with an advisory committee.

Rule 223(2) provides :

In making settlement to any person preference shall always be given to the educated unemployed youths or to co-operatives and co-opt firms formed by such educated unemployed youth. Preference shall also be given to the persons belonging to the mere backward classes.

Note : The terms 'educated unemployed youth' as mentioned in sub-rule (2) of Rule 223 means a person not exceeding 35 years of age who has passed the H.S.L.C. or its equivalent examination and is without any employment.

5. A few facts have to be stated. Before the Board of Revenue passed its earlier order dated February 11, 1982 upholding the grant of licence by the Deputy Commissioner by his order dated August 28, 1981, the Board had called a report from the Deputy Commissioner, Sibsagar, Jorhat and had also before it a parasitic comment of the Deputy Commissioner. On an evaluation of the comparative merits and demerits and after eliminating the other sets of competitions, the Board upheld the grant of licence made by the Deputy Commissioner in favour of the appellants. On a careful consideration of the material on record and in the light of the confidential report made by the

Deputy Commissioner, the Board held that respondents 1 and 2 were not suitable for the grant of licence for the country liquor shop. As regards respondent 1 Parag Saikia, the Board relying upon the report of the Deputy Commissioner held that he was a mere benamidar of a prominent businessman of dibrugarh who was trying to corner big liquor shops at Jorhat and that it was evident from the report that he mostly resides at Gauhati enjoying the pay and perquisites provided by this businessman and that he was apparently not an unemployed person as he was resorting to highly expensive litigation for getting a liquor shop licence. Further, the Board observed that he had the means not only to prefer appeals before the State Government and the Board of Revenue but that he had also repeatedly moved the High court for the grant of appropriate writ, direction or order in the matter of settlement of a country liquor shop which showed that he had some strong financier behind him. As regards respondents 2 Prafulla Barua who was still a student studying for his B.Sc degree and staying in a hostel at Golaghat, the Board held that he could not be treated as an "educated unemployed youth" within the meaning of the Note beneath Rule 223 of the Rules. In reaching the conclusion that it did, the Board of Revenue observed :

In an excise settlement apart from the finance, there is also the question of general suitability of the tenders for a particular shop. It came out during the hearing that this is one of the Sibsagar District. As such substantial revenue of the State is involved in this shop and the suitability of the lessee has therefore to be examined very closely. Under Rule 232 of the Excise Rules, no distinction can be drawn between the legal liabilities of the two partners who will be jointly and severally responsible for the management of the shop. It is implicit in this rule that the partners have to be more or less equal partners. It is also implicit that the settling authority should be satisfied about their respective role, responsibilities, investments and involvements. On a total consideration of the tender, the memo of appeal and the various affidavits and other documents filed on behalf of the appellant Parag Saikia, it appears doubtless that he is the dominant partner and his associate appears more as a show by than even as a sleeping partner.

The Board then went on to say :

Reverting to the partnership of the appellants it is observed that their respective financial investment and physical involvement as well as the sharing of the profit or loss is not known. Indeed for the two persons living in two different Sub-divisional Headquarter towns and having a substantial difference in age and present status, it is difficult to be definite that they have the needed concord and compatibility or unity and understanding for operating a major shop like this. Again, in a double-lessee shop what is needed is not just a second helping hand to a lessee but it requires persons of a minimum caliber from the point of intelligence, experience and business acumen. Parag Saikia by his own admission found that the firm set up by him or joined by him had failed or were non-starters. These considerations might have weighed with the Advisory Committee and the District Collector in not setting with Parag Saikia even any of the smaller shops for which he is known to have tendered and Prafulla Barua being still an undergraduate student might have been considered unsuitable on that ground as well among others.

The Board of Revenue accordingly held that respondent 1 Parag Saikia was a mere benamidar and therefore ineligible for the grant of licence while respondent 2 Prafulla Barua being still a student studying for his B.Sc. degree was not suitable for grant of such privilege, and at any rate, he could

not be encouraged when educated unemployed youths and other suitable tenderers were available. It found considerable force in the submission that the Board should adopt it as a policy to discourage students from entering into liquor business.

6. Regrettably, the High Court while allowing the writ petition preferred by respondents 1 and 2 passed certain strictures which, in our opinion, should have been avoided. It found fault with the Board for having acted on the report of the Deputy Commissioner observing that "the Board could not act on the ipse dixit of the Deputy Commissioner". Further, the High Court held that there was no basis for the Board to adopt a policy to discourage students from entering into liquor business when there was no such legal bar. Still further, it observed that merely because respondent 2 Prafulla Barua was a student of B.Sc. class and was staying at a hostel at Golaghat which was about 30 miles away, it would not be difficult for him to carry on a partnership business at Jorhat where his cousin lives and further that he answers the description of 'educated unemployed youth' envisaged in the Note beneath Rule 223 of the Rules. It recorded that respondent 2 Prafulla Barua had given an undertaking that he would give up his studies if the settlement of the liquor shop was made in his favour. There was no warrant for any of these observations made by the High court and the High Court was not entitled to enter into a question of fact as to whether or not respondent 1 Parag Saikia was a mere benamidar. It is somewhat strange that the High Court should have taken an undertaking from respondent 2 Prafulla Barua that he would give up his studies if the settlement was made in his favour and observed that there was nothing in law to discourage students still undergoing their studies from entering into the liquor business and that he falls within the category of 'educated unemployed youth' within the Note beneath Rule 223 of the Rules.

7. On remand, the Board of Revenue by its order dated December 3, 1982 reacted sharply to the observations and went on to say that the observations were uncalled for. That apart, the Board observed that since the observations were on questions of fact, they could not be taken as binding on the Board. It reaffirmed its earlier order upholding the grant of the licence to the appellants by the deputy commissioner. As regards respondents 1 and 2, the Board relying on the report of the Deputy Commissioner held them to be unsuitable for the grant of licence. It held that respondent 1 Parag Saikia was a mere benamidar of a mahaldar of Dibrugarh district who had cast his net far and wide in the Jorhat Sub-Division and that respondent 2 Prafulla Barua who was still undergoing his studies for the B.Sc. degree could not be regarded as falling within the category of educated unemployed youth appearing in the Note beneath Rule 223 of the Rules. Thereupon, respondents 1, and 2 again moved the High Court under Article 226 of the Constitution for appropriate writ direction or order in the matter of grant of the liquor licence.

8. As was expected, the High Court strongly deprecated the action of the Board of Revenue defying the directions made by the High court in exercise of its jurisdiction under Article 226 of the Constitution and held that the Board had no other alternative but to decide the matter afresh in the light of the directions given by the High Court and expressed its regret that it had not done so at all observing :

Such an effort of subordinate tribunal is fraught with grave danger to the administration of justice known to the people of this country and had to be duly taken note of with great concern by all.

9. The High Court then went on to observed that the Board had thrown all judicial decorum and discipline to the winds by disregarding its judgment. It further observed :

A perusal of the impugned judgment shows that though the petitioners are entitled to preference under rule 223(2) of the Assam Excise Rules, 1945. Hereinafter the Rules, whereas the respondents 1 and 2 are not, they have not been found suitable for settlement for these reasons : (i) Parag, one of the petitioners, is a benamidar; (ii) the partnership in question is sham; and (iii) the petitioners are not financially sound to run the shop.

10. After adverting to the well-settled principles relating to the power of the High court under Article 226 of the Constitutions to issue a writ of certiorari and observing that it was conscious of its own limitations in the matter, the High Court nonetheless observed that "it could definitely set aside the order of an inferior tribunal like the Board of Revenue founded even on some factual conclusions if they were based on irrelevant or extraneous materials or be such which no reasonable person could have reached or if they were grounded on a total misconception of law". It held that a finding reached by the Board by disregarding the directions given to it by the High Court was in excess of jurisdiction.

11. It is regrettable that the Board of Revenue failed to realize that like any other subordinate tribunal, it was subject to the writ jurisdiction of the High court under Article 226 of the Constitution. Just as the judgments and orders of the Supreme Court have to be faithfully obeyed and carried out throughout the territory of India under Article 142 of the Constitution, so should be the judgments and orders of the High Court by all inferior courts and tribunals subject to their supervisory jurisdiction within the State under Article 226 and 227 of the Constitution. We cannot but deprecate the action of the Board of Revenue in refusing to carry out the directions of the High court. In *Bhopal Sugar Industries Limited v. Income-tax Officer, Bhopal* ((1961) 1 SCR 474 : AIR 1961 SC 182 : (1961) 1 SCJ 191 : (1960) 40 ITR 618), the Income-tax officer had virtually refused to carry out the clear and unambiguous directions which a superior tribunal like the Income-tax Appellate Tribunal had given to him by its final order in exercise of its appellate powers in respect of an order of assessment made by him. The Court held that such refusal was in effect a denial of justice and is furthermore destructive of one of the basic principles in the administration of justice based as it is in this country on the hierarchy of courts. The facts of the present case are more or less similar and we would have allowed the matter to rest at that but unfortunately the judgment of the High Court directing the issue of a writ of mandamus for the grant of a liquor licence to respondents 1 and 2 cannot be sustained.

12. The High court dealt with the finding of the Board as to whether or not the alleged partnership between respondents 1 and 2 was genuine. As regards the suitability in their ages which, according to the Board, would stand in the way of needed concord and compatibility, it felt that it was for respondent 2 Prafulla Barua to decide whether respondent 1 Parag Saikia was a suitable person with whom he should enter into a partnership. Secondly, the High Court observed that it would not be difficult for respondent 2 Prafulla Barua although he was a student studying for his B.Sc. degree and staying in a hostel at Golaghat which was some 30 miles away from Jorhat to carry on the liquor business in partnership. Thirdly, the High Court went into the question whether they had the requisite financial capacity to fulfil the requirements of Rule 346. From all this, it is quite evident that the High Court was oblivious of the limitations of its own powers under Article 226 of the Constitution in the matter of grant of a writ of certiorari.

13. It was impermissible for the High Court to have embarked upon an inquiry into the facts to adjudge the suitability or otherwise of the rival pairs of claimants and upon a reappraisal of the evidence come to a finding contrary to that reached by the Board of Revenue. There was nothing on

record to show that the Board had acted in excess of jurisdiction or there was an error apparent on the face of the record which resulted in manifest injustice. That apart, it was not a proper exercise of jurisdiction under Article 226 of the Constitution for the High Court to have issued a writ of mandamus ordaining the Deputy Commissioner to grant the liquor licence to respondents 1 and 2 preference to the appellants. Although a writ of mandamus may be a necessary adjunct to a writ of certiorari, if the High court was satisfied that a writ of certiorari had to be issued to quash the impugned order of the Board of Revenue on the ground that its order was vitiated by an error apparent on the face of the record, the proper course for the High Court to adopt was to have issued a writ of mandamus to hear and redetermine the appeal according to law (H. W. R. Wade's Administrative Law Fifth Edn., p. 638).

14. The High Court was also in error in holding that the earlier order passed by the High Court remanding the case to the Board of Revenue contained a direction requiring the Board not to act upon the report of the Deputy Commissioner. The fact that the Board had in the past in some other case viz. for the grant of liquor licence for Melan Country Spirit Shop not acted upon the report of the Deputy Commissioner against respondent 1 Parag Saikia was not a ground sufficient for ignoring the adverse report of the Deputy Commissioner against him in the present case. It would be apposite to quote the report which reads as follows :

Jorhat town country spirit shop No. 1 (with which shop we are concerned) is meant for joint lessee. Just after the submission of the tender on August 21, 1981 secret information was received to the effect that Shri Parag Saikia (one of the petitioners in the case) is in the private employment of a prominent businessmen of Dibrugarh district who is also said to be benamidar of important C.S. shops and Shri. Saikia resides in Gauhati for the greater part of the year enjoying all the perquisites of the employer. The secret information further indicates that the said benamidar of Dibrugarh district was trying to grab important shops of Jorhat Sub-division through Parag Saikia. The matter was discussed in the Advisory Board which rejected the tender of the joint appellant.

15. Further, the High Court had observed that the Board could not have relied upon the report of the Deputy Commissioner unless respondents 1 and 2 were confronted with the same and respondent 1 was allowed to have the say in the matter. The reasoning of the High Court can hardly be supported. In the first place, the Deputy Commissioner is the head of the administration of the district and is conversant with the local situation and has secret sources of information. Normally the Board is entitled to rely upon the word of the Deputy Commissioner. It is expected that the Deputy Commissioner would always act with a sense of responsibility. Secondly, the report of the Deputy Commissioner was confidential in nature. There was no question of the Board disclosing the content of the report to respondents 1 and 2. Further, respondent 1 and 2 never made a demand for a copy of the report, and even if such a request was made, the Board would have been fully justified in not furnishing the same. Such a refusal would not amount to denial of natural justice for the obvious reason that the rules of natural justice must necessarily vary with the nature of the right and the attendant circumstances. The grant of a liquor licence was not a matter of right but merely in the nature of privilege. Furthermore, the Board was entitled to call for a report of the Deputy Commissioner in an appeal of this nature.

16. We cannot also subscribed to the view expressed by the High Court that respondents 2 Prafulla Barua who is a student of B.Sc. class still undergoing his studies falls within the description of "educated unemployed youth" appearing in the Note beneath Rule 223 of the Rules. In our

judgment, the expression 'educated unemployed youth' has definite legal connotation. It denotes a class of citizens who after completing their education are faced with unemployment. Rule 223(2) read with the Note embodies a rule of preference. The question of grant of preference under the Note beneath Rule 223(2) can only arise when other conditions as regards suitability of the rival tenderers is equal. Besides, the construction placed by the High court on the expression 'educated unemployed youth' is manifestly erroneous. By no stretch of imagination can a student still undergoing his studies in a university be regarded as having completed his education or being 'unemployed' youth. When a person is still pursuing his course of studies in a university, we fail to see any basis for treating him as an 'educated unemployed youth'. The judgment of the High Court directing the issue of a licence to respondents 1 and 2 being based on the rule of preference contained in the Note beneath Rule 223 of the Rules cannot therefore be supported.

17. The judgment of the High court also suffers from a serious infirmity. As already stated, instead of remitting the matter to the Board of Revenue, the High Court issued a mandamus directing the Deputy Commissioner to make a grant of the licence to respondents 1 and 2. While doing so, the High court made a direction that the grant of licence would be subject to the result of the inquiry as to whether respondent 1 Parag Saikia was a benamidar and therefore not entitled to such grant. Moreover, the High Court made the grant subject to the result of the writ petition filed by the interveners Daya Ram Borah and Prabin Kumar Borah which was still pending before it against the earlier order of the Board dated February 11, 1982. We fail to appreciate the making of a grant in favour of respondents 1 and 2 subject to the result of the inquiry as to whether respondent 1 Parag Saikia was a mere benamidar. If that were to be so, it would affect the validity of the grant itself. Further, the procedure adopted by the High Court in separately dealing with the writ petition filed by respondents 1 and 2 making a grant of the licence to them for the country spirit shop in question while the earlier writ petition filed by the interveners was still pending was not in consonance with law and rules of fair play and justice.

18. Before parting with the case we must express our deep sense of anguish that there should have been this unseemly tussle between the High Court and the Board of Revenue, particularly the lack of restraint in the language used by the Board in its order dated December 3, 1982. We also feel that the High Court was not right in criticizing the Board of Revenue in such strong language. The use of harsh language does not redound to the credit of anyone. There must be restraint at all levels as otherwise there can be no rule of law and our entire system of administration of justice will fail.

19. For these reasons, we set aside the judgment and order of the High Court, as a consequence whereof the order of the Board of Revenue dated December 3, 1982 will stand restored. We hope and trust that the High Court will be able to dispose of the writ petition as expeditiously as possible. The writ petition filed by the interveners shall also be heard and disposed of by the High Court along with this writ petition according to law.

20. There shall be no order as to costs.

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