

Shyam Kishore Kapur and anr. Vs. the Licensing Board (Excise) and ors.

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Court : Allahabad

Decided On : May-09-1957

Reported in : AIR1957All773

Judge : Mehrotra, J.

Acts : [Uttar Pradesh Excise Act, 1910](#) - Sections 40; Uttar Pradesh Excise Rule - Rule 366; [Constitution of India](#) - Article 226

Appeal No. : Civil Misc. Writ Nos. 809 and 1130 of 1957

Appellant : Shyam Kishore Kapur and anr.

Respondent : The Licensing Board (Excise) and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : S.N. Kacker and ;S.C. Khare, Advs.

Disposition : Petition allowed

Judgement :

ORDER

Mehrotra, J.

1. The petitioners obtained, a licence under an auction held in the year 1956 for the year 1956-57, the period beginning from the 1-4-1956 to the 31-3-1957. The

highest bid of the petitioners was for Rs. 72,000/- for the four shops to be run within the municipal limits of Allahabad. The rival bidder was one L. Shiv Dayal Jaiswal. The right for selling opium in retail within the municipal limits of Allahabad used to be given away by public auction to the highest bidder by the District Magistrate under the provisions of the Excise Act,

In February 1957 it was given out by the Excise authorities that in future there will be no auction for giving licence for selling the opium in retail. A new system was to be introduced which was known as Surcharge system and the applications for purpose of obtaining licence were to be made to the Excise Licensing Board for Allahabad City. The petitioners thereafter applied to the Licensing Board and L. Shiv Dayal Jaiswal also made a similar application. The Licensing Board considered the various applications on the 21-3-1957 and it was given out to the petitioners that, the names of L. Shiv Dayal Jaiswal for Rani Mandi shop and one Sri Sita Bam of Katra for Katra shop had been approved for the grant of opium ' licence. On the 23-3-1957 the petitioners then made an application to the District Magistrate praying that the petitioners be allowed an opportunity to represent their case before, him through their counsel.

On the 26-3-1957 another detailed application was made to the District Magistrate on behalf of the petitioners for an opportunity to be given to represent the correct facts. On the 28-3-1957 another application addressed to the Chairman, Licensing Board, was made by the petitioners and the matter, to the knowledge of the petitioners was again considered by the Licensing Board on the 29-3-1957. On these facts the present petition has been filed under Article 226 of the Constitution for the following reliefs:--

(a) A writ of certiorari quashing the decision of the Licensing Board dated the 21-3-1957 giving the licence to Sri Shiv Dayal Jaiswal for the opium shops within the Allahabad Municipal limits for the year 1957-58, and also

(b) a writ of certiorari quashing the proceedings of the Licensing Board dated the 21st of March and 29th of March 1957.

2. This petition was filed on the 1-4-1957. Notice was issued and an order was made that a date for hearing be fixed within three weeks. Originally the Licensing Board through its Chairman and the Collector were impleaded as opposite parties but thereafter an application was made on behalf of Shiv Dayal Jaiswal for being impleaded as an opposite party. His application was allowed and it was directed that he be impleaded as an opposite party. Another application was filed on behalf of Sita Ram through Sri Gajadhar Prasad Bhargava for being impleaded as a party. He was, however, permitted to oppose the petition.

3. The main contention raised by the petitioners in the present petition is that the constitution of the Licensing Board was not proper and consequently the entire proceedings held on the 21-3-1957 and the 29-3-1957 were illegal and must be quashed. It is conceded that in these proceedings the petitioners are not entitled to any grant of licence to them. The only relief which the petitioners are entitled to claim is the quashing of the proceedings of the 21-3-1957 and the 28-3-1957.

4. It is not disputed that prior to the year commencing from the 1-4-1957 to the 31-3-1958 the system adopted for the administration of the excise shops in the district was that the shops in the city were auctioned to the highest bidder the person who offered the highest licence fee was then granted licence and under the licence he was to sell opium in retail in those shops. The State Government, however, in pursuance of the policy to restrict the consumption of opium by individuals directed that the retail opium was limited to card-holders under the U. P. Opium (Restriction on oral Consumption) Rules, 1955 as notified in the U. P. Gazette of the 17-9-1955.

The Excise Commissioner with a view to implement the policy of the State Government to restrict further the sale of opium issued an order on the 2nd February 1957 and by that decided to retail only two shops one in Rani Mandi and another in Katra during the year 1957-58. The shops were to function under a surcharge system and in order to implement this order applications were invited through publication, in newspapers for the grant of licence for these two shops.

The meeting of the Licensing Board was to be called, in the first fortnight of March 1957. On the 21-3-1957 it was decided to give licence of the Rani Mandi shop to

Sri Shiv Dayal Jaiswal and that of Katra to Sri Sita Rani, it will be convenient to point out at this stage that the assertion of the petitioners that Sri Shiv Dayal Jaiswal participated in the meeting of the 21-3-1957 has been denied by the opposite parties. The proceeding of the meeting were forwarded by the Secretary to the Collector of Allahabad.

The Collector, however approved of the grant of licence to Shri Shiv Dayal Jaiswal but did not approve the recommendation of the committee with regard to the grant of the Katra shop licence to Sita Ram. Another meeting was held on the 29-3-1957 and its earlier decision was re-affirmed.

5. The main grounds on which the constitution of the licensing Board has been challenged are: firstly that there were no proper representatives of the municipal board on the Licensing Board; secondly, that Shri Shiv Dayal Jaiswal was not duly elected representative of the Licence-holders and that he participated in the proceedings on the 21-3-1957 in violation of the provisions of the Excise Manual; thirdly, it is said that one Kalian who is said to-be the representative of the-labouring classes did not reside within the municipality as he resided in the Cantonment area and took keen interest in the affairs of the Cantonment. In the counter-affidavit filed on behalf of Sri shiv Dayal Jaiswal it is asserted that Kalian was a resident of Rajapur within the municipal limits.

At the highest that is a question of fact on which there is a controversy between the parties and this Court in these circumstances will not enter into that question, and in the absence of any other definite evidence it cannot be held that Kalian was not resident of the municipality and thus disqualified from being a member of the Licensing Board. It is conceded by the opposite parties that five representatives of the Municipal Board were those who were nominated by the District Magistrate. In the year 1953 the U. P. Government passed an Act (Act XVII of 1953) under which an Administrator was appointed for the Allahabad Municipal Board and the Board thereafter ceased to function through its elected representatives.

The Executive Officer of the Allahabad Municipal Board wrote a letter to the District Magistrate which reached the office of the District Magistrate on the 7-8-1953 to the effect that insupersession of the previous resolution of the Board

henceforth the Administrator or his nominee was to represent the Board in the Managing Committee of the Excise Licensing Board. The Collector, however, after reference to and approval of the Excise Commissioner nominated the following five persons as members of the Licensing Board:--

1. Sri. S B. Viragi.

2.-Sri Gokul Pasi.

3. Srimati Rajendra Kumar Bajpai.

4. Dr. Harbans Sahai.

5. Sri Mool Narain Malviya.

6. The stand taken by the State as regards the representatives of the Municipal Board is that the Collector in the exercise of his powers under paragraph 368 (4) of the Excess Manual nominated five persons as the representatives of the Board. It is necessary to refer to some of the provisions of the Excise Act and the Rules framed there under to appreciate the points raised by the petitioners.

7. Section 10 of the U. P. Excise Act provides as follows:--

'10. (1) The administration of the excise department in any district shall, unless the Local Government otherwise directs, be under the charge Of the Collector of that district.

(2) The Local Government may -by notification applicable to the whole of the united Provinces or to any district or local area comprised therein--

(a) appoint an officer hereinafter referred to as the Excise Commissioner, who shall, subject to the orders of the Local Government have the control of the administration of the excise department.

(b) constitute a licensing board or appointany person other than the Collector to exercise allor any of the powers and to perform all or anyof the duties of a Collector in respect of the administration of the excise department either

concurrently with or in subordination to or in exclusion of the Collector, subject to such control as the Local Government may direct, X X X ' X X '

8. Section 21 of the Act provides that no intoxicant shall be sold without a licence from the Collector. Reading these two sections together it is clear that by a notification wherever a Licensing Board is constituted the State Government may confer the power exercisable by the collector Under Section 21 to grant a licence on the Licensing Board. In the present case the Licensing Board was in existence from before. The function of granting or refusing licence to the retail opium dealers was also entrusted to the Licensing Board.

The power therefore exercisable by the District Magistrate for granting any licence for the retail sale of opium was conferred on the Licensing Board. Nothing has been shown to me on behalf of the State which would go to suggest that it was not the function of the Licensing Board to grant licences or to select candidates for the grant of licence for the retail sale of opium.

9. Paragraph 366 of the Act provides as follows :--

'366. A Licensing Board constituted in a municipality shall consist of eleven members as follows :

(a) Five members of the municipal board elected by the municipal board, who shall demit office when new representatives have been selected by the succeeding Municipal Board or by the Collector on its failure to do so within the prescribed time.

In the event of a municipal board being dissolved or superseded by an order Under Section 30 of the United Provinces Municipalities Act, 1916 (Act II of 1916), the Excise Commissioner shall, after consulting the District Magistrate concerned, nominate five such persons, residing within the, municipal limits, as are eligible to be elected as members of the municipal board under the law and the rules for the same being in force to serve on the licensing board:

Provided that the members nominated shall demit office When the licensing board or the municipal board is reconstituted, whichever is earlier'

(k) In a case in which a vacancy occurs in the Board, during its term of office, the Collector shall arrange to fill such vacancy for the remainder of the Board's term of office, in accordance with the procedure governing election hereinafter prescribed.'

Paragraph 368 of the Act then lays down the procedure regarding the constitution of Licensing Boards in the municipalities. Paragraph 368 (1). reads as follows :--

'The board shall be reconstituted every fourth year within two months immediately following the municipal elections. The newly elected Municipal Board shall be asked to elect its representatives as soon as it is regularly constituted, Sub-section (4) of Section 368 provides that :--

'If the Municipal Board fails to elect five of its members to serve on the Licensing Board within the period specified in Rule (1) supra the Collector shall appoint the requisite number of members of the Municipal Board for the purpose.' Paragraph 370 lays down the_ duties of a Licensing Board and Sub-section (f) provides as follows:

'370. The duties of a Licensing Board are (f) to meet during the first half of December and May of each year, and not later than the fifteenth or in the case of the settlement of lari shops under the tree-tax system, during the first week of August of each year (1) to confirm in the absence of written objections of qualified objectors under Clauses (c) (viii), the proposals published by the Board under Clause (c) (i) and (ii), or (2) to confirm or modify the said proposals after giving full consideration to the written objections received from qualified objectors, and hearing such objectors if they so desire, and (3): to select in accordance with the procedure prescribed by Rule 371 licensees under the surcharge system from the shops shown as 'vacant' in the list published under Clause (c) from amongst the applications received (c) (vi).' Sub-section .(g) provides as follows :-- 'To meet when convened by the Collector for the purpose of giving him advice on matters connected with excise, of instructing him regarding shop sites or for confirming or modifying arrangement made by him for carrying on the business of a shop which has been subjected to picketing for political purposes, or for temporary creation of new shops to take the place of, or to be started in addition to, existing shops which have been subjected to picketing for political purposes, or the licensee of which

has either died or resigned or has had. his licence canceled by the Collector for default of payment of the licence fees or for breach of the condition of his licence.'

10. No elections took place for a very long time in the Allahabad Municipality and in the year 1953 an Administrator was appointed and all the functions of the Municipal Board were exercisable by the Administrator.

The elected members ceased .to be the members of the Board. Under those circumstances the stand taken by the State is that the Board failed to nominate its members and consequently under the paragraph 306 (a) the Collector had power to appoint its own nominees on the Board. A right was also claimed under paragraph 368(4) on behalf of the Collector to nominate members of the Board. In my opinion paragraph 368(4) does not in terms apply to the present circumstances. Paragraph 368 (4) which I have already referred to only gives power to the Collector to appoint a requisite number of members of the Municipal Board as the members of the Excise Licensing Board in case the Municipal Board fails to elect five of its members to serve on the Licensing Board within the period specified in sub-paragraph (1). Sub-paragraph (1) of paragraph 368' provides that the Licensing Board shall be reconstituted immediately following the municipal elections.

In the present case admittedly no municipal elections took place. There were no elected members of the Municipal Hoard and consequently sub-paragraph (4) of paragraph 368 in terms would not apply. There was no failure on the part of the Municipal Board, to elect five of its members within the period prescribed in sub-paragraph 368 (1). Nor the Collector had appointed the requisite number of members of the Municipal Board because there were no elected members. The counsel for Sri Shiv Dayal jaiswal, however, relied upon paragraph 366 (a) read with paragraph 366 (k).

It was contended that the old members office would come to an end when the new representatives have been selected by the succeeding Municipal Board or by the Collector on its failure to do so. As the Municipal Board had come to an end it was the Administrator in whom the powers of the Board have vested Under the U. P, Act No- XVII of 1953 and as it was not possible for the Administrator to select five

members of the Municipal Board for the purpose of representing it on the Licensing Board inasmuch as all the elected members had ceased to be the members of the Board the Administrator can be regarded to have failed to send its representatives and the Collector could nominate five members. This argument to my mind has no substance.

If the Administrator is to be regarded as the succeeding Municipal Board within the meaning Of para. 366(a) it was open to the Administrator to send five persons as representing the interest of the Board and there was no failure on the part of the succeeding Municipal Board to send its representatives. In this connection it was argued by the counsel for Sri Shiv Dayal Jaiswal that the word 'selected' in the later part of paragraph 366(a) is synonymous with the word 'selected' in the first part of the same paragraph.

Reading paragraph 366 as a whole it appearsthat the scheme of the rule was that the Licensing Board should have five representatives of the Municipal Board. When by an Act of the State all the functions of the Board, vested in the Administrator the reasonable way of interpreting it is that the Collectors' power to nominate would only arise under clause 366 (a) if the Administrator failed to send his own representatives Because the elected .members had ceased to be the members of the Board and thus the Administrator could not send five members of the Board, it could not be said that the Board had failed to send its representatives so as to give power to the Collector to appoint five members of the Board. Paragraph 366 (k) which was also relied upon by the counsel for Shri Shiv Dayal Jaiswal, does not apply to the present circumstances, as it says that in the event of any vacancy occurring in the Board the Collector shall arrange to fill such vacancy for the remainder of the Board's term of office, in accordance with the procedure governing election hereinafter prescribed.

In the present case even if the argument of the counsel is accepted that there was a vacancy as the representatives of the Municipal Board-ceased to be members it could only be filled in by the Collector in accordance with the procedure governing the election of the representatives of the Board, but he could not nominate Persona of his own choice. The procedure for the election of the representatives of

the Municipal .. Board is the same as laid down under paragraph 366 (a) or paragraph 368 (i) Realizing this weakness the counsel for the respondent argued that the Collector had power under paragraph 366 (a) read along with paragraph 366 (k) As I have already pointed out these two clauses can be read together only to give it a reasonable and consistent interpretation and the consistent way of reading the two will be that if there was a vacancy under section 366 (k) the vacancy could be filled in by the Collector in accordance with the procedure for the selection of the municipal representatives given in paragraph 366 (a), Administrator gets on the powers of the Municipal Board under the U. P. Act and thus the power of selection under paragraph 366 (a) should also vest in the Administrator.

In the present case it cannot be said that Administrator failed to send his representatives inasmuch as there was already a letter by the Administrator to the District Magistrate for being permitted to send his own nominees. It cannot be said to be a failure to elect the representatives on the part of the Administrator because the Administrator could not find out five members of the Board whom he could send as representatives. In my opinion therefore the five persons nominated by the District Magistrate were not properly nominated as the members of the Licensing Board and there was no proper constitution of the Board Inasmuch as there were no representatives of the Municipal Board.

11. The next point which was urged by the counsel for the State' was that the 'function of the Board in this case was only that of an advisory body and consequently this Court will not interfere with the decision of the Board as the licence was ultimately granted by the District Magistrate. In this connection it was pointed out that the meeting was not one called under paragraph 370 (f) because such a meeting could only take place in the first half of December and May of each year; but it was a meeting convened by the Collector under paragraph (g) for the purpose of giving advice connected with the excise.

In the present case the licence had to be given for the period commencing with the 1st of April! 1957. Paragraphs 370 (a), (b) and (c) provide the procedure when the grant of a licence is to be made and paragraph 370 (f) lays down the procedure for

the selection of the licensees. The meeting which was convened on the 21st of March 1957 selected the licensees. It cannot therefore be said that the meeting was not one under the provision of paragraph 370 (f), but that it was only convened for the purpose of giving advice to the District Magistrate.

12. Two other points were taken as preliminary objections. The Standing counsel said that as the petitioners were in the past licensees and were guilty for breach of the conditions of the licence they were not persons who were entitled to the grant of any licence and consequently this Court will not in the exercise of its powers interfere with the decision of the Licensing Board in refusing licence to the petitioners. The petitioners had applied for the grant of the licence.

Their licence had been refused. Under these circumstances the petitioners have an interest justifying an application to this Court under Article 226 of the Constitution and it is open to them to point out that the Constitution of the Licensing Board was itself not proper.

There was no proper Licensing Board functioning and consequently the proceedings of the meeting of the 21st of March 1957 should be quashed. If and when a proper Licensing Board is constituted it may be open to it to reject the application of the petitioners on the grounds permissible under the provisions of the Excise Act and the Rules thereunder; but this Court will not at this stage investigate into the allegations and counter allegations with regard to the fact that the petitioners have been convicted for the breach of the conditions of the earlier licence and were not thus qualified to get a licence.

13. The other preliminary point raised by the counsel for Sri Shiv Dayal Jaiswal was that the petitioners having submitted to the jurisdiction of the Licensing Board are not entitled to the relief of a writ of certiorari. Reliance was placed in this connection on the case of *Surya Rao v. Board of Revenue*, AIR 1953 Mad 472 (A). In the cases where a person submits to the jurisdiction of a tribunal different considerations may arise when a relief of certiorari is claimed for. Even in those cases it may be said that if there is an initial want of jurisdiction the mere fact that the petitioner has failed to raise an objection to the want of jurisdiction in the trial court will not disentitle him to a relief by this Court.

But in the present case it was a Licensing Board constituted under the provisions of the statute for discharging certain administrative functions. It is always open to the petitioners to say that there is no such properly constituted body which could act in administrative matters and any decision taken by such a body will necessarily be without jurisdiction which can be challenged by the petitioners under Article 226 of the Constitution, even though they had applied for a relief before that statutory body which was refused to them. The fact that the petitioners themselves applied along with others for the grant of a licence to them which was considered by the Licensing Board is no bar to the petitioners coming to this Court under Article 226 of the Constitution and challenging the constitution of the board itself.

14. The next objection taken by the opposite parties was that the conduct of the petitioners amounts to a waiver. It was said that the petitioners themselves applied for the grant of the licence to the Licensing Board and even in the representation made subsequently to the District Magistrate there, was no point taken that the Licensing Board was not properly constituted. In my opinion there is no force in this objection either.

There may be a waiver with regard to the exercise of the jurisdiction but when there is no proper constitution of the statutory body which could only act if it was properly constituted, any action taken by such a body will be without jurisdiction and there could be no waiver of the right to point out that the statutory body was not properly constituted at all. It is not a case of the exercise of jurisdiction but of the initial want of jurisdiction.

15. Another objection raised by the counsel for the opposite parties was that the petitioners had an alternative remedy available to them by filing an appeal against the order or decision of the Licensing Board. An appeal is provided against the order or decision of the Licensing Board; but in the present case according to the petitioners' own contention, there was no Licensing Board at all.

There was thus no order passed by the Licensing Board against which an appeal could be filed. It was urged that as the order purports to have been passed by the Licensing Board it was open to the petitioners, to have gone up in appeal and in

appeal to raise the question of the proper constitution of the Licensing Board; but, as I have said above there being no order by the Licensing Board at all no appeal lay. The right to go up in appeal is not an absolute bar to the maintainability of a petition under Article 226 of the constitution and in circumstances of the case it cannot also be said that the alternative remedy was equally adequate and efficacious.

16. The petitioners further raised the question that Sri Shiv Dayal Jaiswal was not a properly nominated member as he Was not the representative of the licensees: nor had the licensees failed to exercise their right of election which gave right to the Collector to nominate his own nominee. As I have held that there was no proper representation of the Municipal Board and thus the constitution of the Licensing Board was not proper, it is not necessary to decide this question. It will be for the district authorities to consider when they are constituting a proper Licensing Board whether there was any proper election of the representative of the licensees or not.

17. There is therefore no force In the preliminary objections.

18. In the result therefore I allow this petition and quash the proceedings of the Licensing Board dated the 21st of March 1957 and the 29th of March 1957; but in the circumstances of the case the parties will bear their own costs.

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