

# **Abhineet Mani Tripathi Son Of Dr. ... vs The State Of U.P. Through The Secretary ... on 22 August, 2006**

**Author: Prakash Krishna**

**Bench: Prakash Krishna**

## **JUDGMENT**

Prakash Krishna, J.

1. The dispute pertains to the grant of license for retail vend of Foreign liquor at Asuram Chowk and Kusmahi Bazar in the district of Gorakhpur. The petitioner was granted a license by the District Magistrate, Gorakhpur, to vend Foreign liquor from aforesaid two shops for the excise year 2002-03. In the next Excise year i.e. 2003-04 the policy of the State Government to grant excise license was changed. The State Government now decided to grant excise shop by way of renewal to the existing licensees of the excise year 2002-03. The petitioner in pursuance of the aforesaid excise policy applied for and was granted renewal of the license for the excise year 2003-04. The grant of said renewal of license in favour of the petitioner was challenged by respondent No. 4 Sri Rakesh Shukla, by filing Civil Misc. Writ Petition No. 528 of 2003 in this Court, which was disposed of by order dated 4-4-2003 with a direction to the authority concerned to decide the representation of the petitioner therein namely Sri Rakesh Shukla, who is respondent No. 4 in the present petition. The matter was ultimately reached to the licensing authority namely the Collector, Gorakhpur, who by his order dated 23-4-2004 held that the present petitioner had obtained a license for the excise year 2002-03 by concealing material facts and in violation of the rules namely 'The U.P. Excise (Settlement of License for Retail Sale of Foreign liquor) (Excluding Beer and Wine) Rules, 2002 (for short called as Rules, 2002), as amended from time to time. He found that the present petitioner was benamidar of Sri Rakesh Shukla and Sri Rakesh Shukla is the ultimate beneficiary of the license and such transaction is not permissible under the aforesaid Rules. He, therefore, by the said order dated 23-4-2004, besides canceling the license of the petitioner also ordered that these shops may be settled by draw of lottery by inviting applications from the open market. Feeling aggrieved against the aforesaid order only the present petition preferred Excise appeal No. 38 of 2001 before the Additional Excise Commissioner, U.P., Allahabad under Section 11(1) of U.P. Excise Act, 1910. During the pendency of aforesaid appeal, the Excise department through publication in the news-paper invited applications for the grant of license from public at large. Two persons namely Sri Navin Jaiswal and Sri Subhash Chandra respondents No. 5 and 6 herein, referred hereinafter as the contesting respondents were granted license to run the aforesaid two shops for the remaining part of the excise year 2003-04. It is also not in dispute that the licenses of the contesting respondents were renewed for the next excise year i.e. 2004-05, 2005-06 and 2006-07.

2. In the aforesaid departmental appeal No. 38 of 2001 the contesting respondents besides Sri Rakesh Shukla were impleaded as respondents No. 4 and 5 as parties. The Additional Excise Commissioner by order dated 1-4-2005 allowed the appeal and set aside the order passed by the Collector, cancelling the license of the petitioner for the aforesaid two shops with the further direction that the license of the petitioner shall be deemed to continue for the excise year 20005- 06 on the enhanced license fees as per policy of the State Government.

3. The aforesaid order was ultimately challenged on merits by way of revision under Section 11(2) of U.P. Excise Act, 1910 before the State Government. Three revisions were preferred. Revision No. 20 of 2005 was filed by Sri Navin Jaiswal , respondent No. 5, the revision No. 21 of 2005 was filed by Sri Suresh Chandra, respondent No. 6 and Sri Rakesh Shukla, who was instrumental in getting the proceedings initiated against the petitioner claiming himself to be the real license holder also filed being revision No. 34 of 2005. All the three revisions were heard and initially disposed of by order dated 10-5-2005. The State Government allowed the revisions filed by the contesting respondents and it dismissed the revision filed by Sri Rakesh Shukla. This led filing of the two writ petitions in this Court being Civil Misc. Writ Petition No. 942 of 2005 Abhineet Mani Tripathi v. Secretary, Excise department, U.P. Shasan Lucknow and Ors. and Writ Petition No. 958 of 2005 Rakesh Shukla v. State of U.P. and Ors.. This Court by judgment dated 1-7-2005 disposed of both the writ petitions quashed the order dated 10-5-2005 on the finding that the State Government has justified the order canceling the license on the basis of the claim of Sri Rakesh Shukla, whereas the revision filed by Sri Rakesh Shukla has been dismissed. This Court also observed that so far as the contesting respondents namely Sri Navin Chandra and Sri Subhash Chandra are concerned the grant of licenses to them clearly depends on the decision / outcome of the appeal. The Court also doubted the right of Sri Rakesh Shukla to maintain revision before the State Government as he did not challenge the order passed by the Collector, Gorakhpur Cancelling the license granted in favour of the petitioner and holding that neither the petitioner nor Sri Rakesh Shukla were entitled for grant of excise license. Consequently the matter was restored back before the State Government to decide the controversy afresh

4. This time again the State Government by its order dated 29-9-2005 allowed Revision Nos. 20 and 21 of 2005, filed by the contesting respondents and maintained its order so far as it relates to rejection of revision No. 34 of 2005 of Sri Rakesh Shukla, is concerned.

5. Feeling aggrieved against the aforesaid order the present writ petition has been filed challenging the legality and validity of the order of the State Government upholding the cancellation of license of the petitioner.

6. Learned Counsel for the petitioner submitted that the State Government has committed the same error which was committed by it earlier and it has recorded contradictory findings. Elaborating the argument it was submitted that this time also the revision filed by Sri Rakesh Shukla has been dismissed, but the State Government has committed , illegality in allowing the revisions filed by the contesting respondents on the ground that the petitioner was not real licensee of the disputed shops, but it was Rakesh Shukla who had invested money in the business, was the real beneficiary / licensee of the disputed shops. He submitted that it having found that Sri Rakesh Shukla was not

entitled to maintain the revision before the State Government, the lis initiated at the instance of Rakesh Shukla having come to an end by the order of first appellate authority, the question as to whether the petitioner was a benamidar or the real licensee, could not have been gone into by the State Government in the revision filed by the contesting respondents. Plea that the contesting respondents were granted license as a dispute between the petitioner and Sri Rakesh Shukla, was going on, the dispute having been settled in favour of the petitioner by order of the first appellate authority, the contesting respondents have lost their right, title or interest, if any, to run the disputed shops The licenses granted in favour of the contesting respondent were subject to ultimate outcome of the dispute between the petitioner and Sri Rakesh Shukla and has come to an end ipso facto,

7. In reply, learned Standing counsel submitted that the petitioner is not entitled for grant of any relief, inasmuch as it has been found that the entire finances etc. were provided for by Sri Rakesh Shukla to the petitioner. Sri Rakesh Shukla was also holding a license FL-2 i.e. to vend foreign liquor in wholesale. Such a licensee is not entitled for grant of license in question i.e. FL-5 license i.e. vending of foreign liquor on retail basis. Learned Counsel for the respondents supported the order by placing reliance on it.

8. I have given careful consideration to the respective submissions of the learned Counsel for the parties.

9. The Collector, Gorakhpur, by order dated 23-5-2004 found that the petitioner was granted license on incorrect facts. The petitioner mis-represented the facts otherwise he could not have been granted license under the aforesaid Rules. It appears that before him a copy of the agreement entered into in between the petitioner and Sri Rakesh Shukla dated 2-9-2002 ,was produced. The said agreement is notarized and provides that Sri Rakesh Shukla would provide all funds to run the business to vend foreign liquor in retail. As a matter of fact, other documents such as certificate from the Bank was also produced by Sri Rakesh Shukla to show that the license fees and other amounts deposited by the petitioner with the department were, infact, drawn from the Bank account of Sri Rakesh Shukla. Meaning thereby Rakesh Shukla provided the funds to run the business and he undertook the entire financial burden. It has also been noted on Page- 87 of the paper book that the fact that funds etc. were provided for by Rakesh Shukla unimpeachable evidence in the shape of bank certificates, issued by the Banker of Rakesh Shukla was produced. This remained uncontroverted as no evidence to the contrary was produced by the petitioner. It was concluded that thus the petitioner is guilty of filing false affidavit and concealing real state of affairs with the department and unauthorizedly participated in the draw of lottery and there by succeeded in getting the license. On the analysis of the material on record a finding was recorded that such an agreement in between the petitioner and Sri Rakesh Shukla was violative of new excise policy which was aimed to bring down the control of syndicate and mafias in the excise department.

10. Although the aforesaid order was set-aside in appeal. It has been found in the appeal that from the agreement dated 2-5-2002 verified before Notary on 3-10-2002, it is difficult to accept that this would disentitle the petitioner to get the license of the shop renewed. In the event of any dispute, he opined, the matter may go before the competent Civil court. He has further observed that by passing

the order dated 23-4-2004 cancelling the license it has encouraged the monopoly in the excise business. Reliance has been placed on a judgment of this Court delivered in Writ Petition No. 585 of 2004 Ram Dulare Tiwari v. State of U.P. and Ors. , wherein it has been provided that admission of a person as a partner in the business subsequent to the grant of license will make such persons only partner of such shop and will not make such person " co- licensee".

11. The aforesaid order of the first appellate authority has been set aside in revision by the State Government by the impugned order. The State Government has recorded two basic findings in its order. Firstly, from the partnership deed dated 2-9-2005, it is clear that the license of the disputed shop was taken in the name of present petitioner as Sri Rakesh Shukla was not eligible for the same being holder of Excise license FL-2 to vend foreign liquor in wholesale. Secondly, the law laid down in Writ Petition No. 585 of 2000 Ram Dulare Tiwari v. State of U.P. and Ors., was wrongly relied upon by the first appellate authority.

12. No serious attempt was made by the learned Counsel for the petitioner to challenge the aforesaid two points.

13. It could not be disputed by the petitioner that Sri Rakesh Shukla is holder of FL-2 license and could not have been granted FL-5 license, Rule 18(1)(d) and 18(1)(g) of the Rules, which have been relied upon by the Collector as well as by the State Government of the U.P. Excise (Settlement of Licenses for Retail Sale of Foreign Liquor) (Excluding Beer and Wine) (Third Amendment) Rules, 2002 as published in 2002 Lucknow Law Times (Part-V) at Page 74 is reproduced below:

18(1) -Licensing authority may suspend or cancel the licence

(a)....

(b)...

(c)....

(d) If the affidavit submitted by the licensee at the time of application is found incorrect and assertions made therein are found to be false;

(e)...

(f)...

(g) If it is found that the licence has been obtained in a false name and the licensee is holding the license on behalf of some other person (2) The licensing authority shall immediately suspend the licence and also serve a show cause notice for cancellation of licence and for forfeiture of security deposit, the licensee shall submit his explanation within 7 days of the receipt of notice. Thereafter the licensing authority shall pass suitable orders after giving due opportunity of hearing to the licensee, if he

so desires.

14. A bare perusal of the aforesaid two clauses (d) and (g) relied upon by the authorities below would clearly show that if it is found that the license has been obtained in false name and licensee is holding license on behalf of some other person, the licensing authority may cancel the license. The State Government, as a matter of fact, found and it could not be disputed in view of the certificate issued by the Allahabad Bank it is clear that a sum of Rs. 55,50,000/- and Rs. 1,62,00,000/- were transferred through cheques from the current account No. 243 (the Account holder is Rakesh Shukla) in favour of District Excise Officer, Gorakhpur. In the absence of any contrary material on record, the inference drawn by the State Government in the impugned order that the entire finances were provided for by respondent No. 4 who was real beneficiary of the business, cannot be faulted with. The said finding is based on relevant considerations and material on record. In view of this uncontroverted and clinching evidence applicability of Rule 18(1)(g) of Rules, 2002 is well established. It has been found ,as a fact that the license was obtained in false name i.e. in the name of the petitioner and the licensee is holding license on behalf of other person i.e. Sri Rakesh Shukla. It is also not in dispute that Sri Rakesh Shukla is holding license to vend foreign liquor in whole sale and cannot be permitted retailing in foreign liquor. In this view of the matter the renewal of license in favour of the petitioner would amount permitting the thing which is otherwise not permissible in law. The Supreme Court in the case of Taxi owners United Transport Company v. State Transport Authority (Orissa) has observed as follows:

What cannot be done directly cannot be permitted to done indirectly, is well recognized principles of law. In this view of the matter there is no error apparent on the face of record in the order of the State Government cancelling the license of the petitioner.

15. Strong reliance was placed on a decision of the Apex Court in the case of Gorakhnath v. State of U.P. and Ors. (1996) 11 SCC 278 and it was submitted that the license of the contesting respondents was by way of temporary arrangement and the petitioner is entitled for grant of license inasmuch as the order of the Collector, Gorakhpur has been set aside in appeal.

16. Be that as it may, in view of the findings as recorded above, the petitioner is not entitled for grant of any relief otherwise it would amount issuance of writ, or order permitting the petitioner to violate the law i.e. Rule 18(1)(g) of Rules, 2002. It is acknowledge legal position that no writ order or direction can be issued by a writ court to violate law

17. The argument of learned Counsel for the respondent that in any view of the matter the Excise year 2003- 04 and 2004- 05 is already over and the contesting respondents are running the disputed shop, also needs weightage to refuse the relief as prayed for in the writ petition.

18. In the result there is no merit in the writ petition. The writ petition is dismissed. There shall be however, no order as to costs.