

(2005) 08 CAL CK 0063

Calcutta High Court

Case No: Writ Petition No. 11587 (W) of 2005

Abdul Annas Khan

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: Aug. 25, 2005

Acts Referred:

- Motor Vehicles Act, 1988 - Section 116, 117
- West Bengal Land Reforms Act, 1955 - Section 4C
- West Bengal Land Reforms Rules, 1965 - Rule 5A

Citation: (2006) 1 CALLT 313 : (2006) 1 CLT 313

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Koshi Kanta Moitra, Fazle Rabi, Sk. Anowar Ali and Sk. Mustak Ali, for the Appellant; Ashok Dey and Mahananda Roy for Respondent No. 8 and Bharati Mutsuddi and Nilima Das for State, for the Respondent

Final Decision: Allowed

Judgement

Jyotirmay Bhattacharya, J.

Series of litigations have taken place between the petitioner and the respondent No. 8 who are two rival traders; both engaged in the same business of holding Cowmarket within the same Panchayat Samiti. A dispute arose between them with regard to the fixation of dates for holding their respective Hats on their respective plots of land.

2. Let me give the short background of the dispute between the parties leading to the filing of this writ petition.

3. For holding a cowmarket in Chandipur Panchayat Samiti area within the district of Purba Medinipur, the petitioner got his land lying at Plot No. 1037 (.24 decimals), Plot No. 1035 (.02 decimal), Plot No. 1036 (.05 decimal), Plot No. 1016 (29 decimal)

and Plot No. 1039 (.02 decimal) Total area 62 decimal at Mouza Nar, J.L. No. 39 within Khatian No. 603, Police Station Chandipur, District Purba Medinipur (hereinafter referred to as the said land) converted from agricultural to non-agricultural land u/s 4C(a) of the West Bengal Land Reforms Act read with Rule 5A of the West Bengal Land Reforms Rules on the basis of an order passed by the competent authority under the West Bengal Land Reforms Act.

4. Pursuant to an application filed by the petitioner, a licence for holding the said cowmarket on the aforesaid land of the petitioner was granted by the Chandipur Panchayat Samiti to the petitioner on 11th January 2005. The said licence remained valid till 31st March 2005.

5. After obtaining the said licence, the petitioner started running his business of holding cowmarket on the said plots of land on two days in a week, i.e., on every Tuesday and Wednesday.

6. Sk. Anwar alias Fakir, the respondent No. 8 herein, who is also holding the cowmarket on every Tuesday and Wednesday in a week, submitted a representation to the Executive Officer and the Block Development Officer, Nandigram-III Panchayat Samiti on 7th February, 2005 praying for alteration of the schedule for holding the cowmarket by the petitioner, so that the competition between two rival traders in the same trade can be avoided,

7. Complaining inaction on the part of the concerned Block Development Officer, a writ petition being W.P.No. 2614 (W) of 2005 was filed by the respondent No. 8.

8. The said writ petition was ultimately disposed of by Justice Tapan Kumar Dutt on 22nd February, 2005 with a direction upon the concerned Block Development Officer to consider the representation of the said respondent No. 8 in accordance with law and to dispose of the same by a reasoned order after giving an opportunity of hearing to the said respondent as well as the petitioner herein, within a period of four weeks from the date of communication of the said order.

9. Pursuant to the said direction, the concerned Block Development Officer, Chandipur, Purba Medinipur and the Executive Officer, Chandipur Panchayat Samiti, disposed of the said representation of the respondent No. 8 by an order dated 8th March 2005, whereby the petitioner was directed either to close the Hat (market) or to change the days for holding Hat (market) to any day other than Tuesday and Wednesday, as may be fixed by the licensing authority. It was further mentioned therein that the licensing authority shall have the full authority either to revoke the licence or to deny renewal of the licence or to fix the day of holding cowhat on any day other than Tuesday and Wednesday as they think fit.

10. The said order passed by the Block Development Officer, Chandipur was challenged by the petitioner by filing a writ petition before this Court which was registered as W.P. No. 6473(W) of 2005.

11. Another writ petition was also filed by the petitioner challenging the inaction on the part of the concerned respondent for not renewing the licence of the petitioner for the current year though the application for grant of such renewal was submitted by the petitioner even prior to the expiry of the term of the licence. The said writ petition was registered as W.P. No. 6472(W) of 2005.

12. The order passed by the Block Development Officer, Chandipur which was impugned in W.P.No. 6473(W) of 2005 was set aside as the authority which passed the impugned order had no authority to pass such order under the West Bengal Panchayat Act, 1973.

13. The other writ petition being W.P.No. 6472(W) of 2005 was disposed of by this Court in the following manner :-

Accordingly, I dispose of this writ petition by directing the Panchayat Samiti to consider the petitioner's prayer for grant of renewal of the licence as contained in annexure "P-1" to this writ petition at page 16 in the light of the decision of the Hon'ble Supreme Court in the case of [D. Nataraja Mudaliar Vs. The State Transport Authority, Madras](#), and dispose of the same by passing a reasoned order positively within a period of four weeks from the date of communication of this order.

While considering the petitioner's said application for renewal of licence, the concerned authority will give reasonable opportunity of hearing to the petitioner as well as to the private respondent.

Since nothing could be shown to this Court that the licence which was granted in favour of the private respondent was renewed after 31st December 1990, it is made clear that the authority concerned will not allow the private respondent to participate in the said proceeding unless the said respondent can show that he is running the said business legally with a valid subsisting licence granted u/s 117 of the said Act.

I, however, make it clear that in the event it is found that the private respondent is also carrying on his business with a valid licence, then the concerned authority will be free to regulate the schedule of the respective businesses of the petitioner as well as of the private respondent by taking into consideration the relevant factors such as maintenance of sanitation, health and hygiene as well as law and order problem in the locality. Since fixing of schedule for holding hat (market) is the prerogative of the licensee, the authority concerned should not ordinarily encroach upon such prerogative of the licensee except for administrative reasons.

The concerned authority is directed to intimate his decision to the petitioner as well the other party, if any, within a period of two weeks from the date of taking such decision.

The status quo with regard to the carrying on such business by the petitioner should not be disturbed by the authority concerned till two weeks after communication of

such decision by the concerned authority to the petitioner, provided, however, the petitioner pays the licence fees for the said period.

These applications, thus, stand allowed.

14. Pursuant to the aforesaid order of this Court, a fresh consideration was made by the Sabhapati of Chandipur Panchayat Samiti on 27th May 2005 in the presence of the petitioner as well as the respondent No. 8.

15. By taking note of the views of the Police as well as the Block Development Officer, Chandipur, the Sabhapati of the concerned Panchayat Samiti directed the petitioner to change the days for holding hat from Tuesday and Wednesday to Saturday and Sunday, subject to having his licence renewed after depositing appropriate fees to the Cashier and by completing the follow-up action before the Executive Officer, Chandipur Panchayat Samiti. It was also provided therein that if such conditional running of the Hat is found to be inconvenient to the petitioner, then he may close the Hat on his own motion.

16. The validity and/or legality of the said order is under challenge in this writ petition.

17. Mr. Kashi Kanta Moitra, learned senior advocate, appearing for the petitioner, submitted before this Court that the renewal of licence is almost automatic, as ordinarily the licence holder enjoys unfettered right of renewal unless it is shown that outweighing reasons of public interest lead to contrary result. In support of such submission, Mr. Moitra relied upon a decision of the Hon'ble Supreme Court in the case of [D. Nataraja Mudaliar Vs. The State Transport Authority, Madras](#), wherein the Hon'ble Supreme Court while considering the right of a permit holder for renewal of the stage carriage permit under the Motor Vehicles Act held that the permits are not bounty but right, restricted reasonably by Motor Vehicles Act.

18. Mr. Moitra contended that similarly if it is found that the petitioner has not violated any of the terms of licence granted to the petitioner, then renewal cannot be ordinarily refused. Mr. Moitra further submitted that the petitioner has complied with all the necessary formalities for renewal of the licence and as such the prayer for such renewal can neither be refused nor be granted conditionally when the initial grant was unconditional.

19. Mr. Moitra also drew the attention of this Court to the administrative biasness on the part of the concerned authority, as the said authority not only refused to accept the renewal fees from the petitioner on personal tender but also refused to accept the renewal fee which was tendered by the petitioner to the said respondent by money order.

20. Mr. Moitra further contended that in view of the order passed by this Court in the earlier writ petition, the concerned authority ought not to have allowed the respondent No. 8 to participate in the hearing before the Panchayat Samiti as the

said respondent was not running the Hat legally with valid licence granted by the concerned Panchayat Samiti u/s 117 of the said Act. By referring to the licence granted in favour of the respondent No. 8, Mr. Moitra submitted that the grant of such licence immediately a few days back before hearing, in favour of the said respondent for regularizing the illegal trade of the said respondent for last 15 years at a time by the Panchayat Samiti, is another instance of executive biasness on the part of the concerned Panchayat Samiti.

21. Mr. Moitra further contended that conjoint reading of Sections 116 and 117 of the said Act makes it clear that the licence granted in favour of the licensee is renewable annually year to year. According to Mr. Moitra, collection of arrear licence fees for the back period of 15 years at a time is not permissible under the Act.

22. Thus, Mr. Moitra submitted that the licence granted in favour of the respondent No. 8 for the period from 1990-91 to 2005-06 is absolutely illegal and the same should not be recognised as a valid licence under the said Act, If that be so, then according to Mr. Moitra, the Panchayat Samiti ought not to have allowed the respondent No. 8 to participate in the said hearing, in view of the earlier order of this Court passed in the earlier writ petition.

23. Mr. Moitra further submitted that the respondent No. 8 who is carrying on the said trade illegally without any licence since 1990-91 ought not to have been favoured by the concerned authority not only by allowing him to participate in the hearing but also by imposing a condition for grant of renewal of licence in favour of the petitioner at the instance of the respondent No. 8, an illegal trader.

24. Mr. Moitra by relying upon a decision of the Hon'ble Supreme Court in the case of [Mithilesh Garg, Vs. Union of India and others etc. etc.](#), submitted that a rival trader cannot regulate even the setting up the business of another rival trader even if, the business is set up, in violation of the extant Rule. According to Mr. Moitra, private respondent No. 8 being a rival trader has no locus standi to regulate the term of the licence of the petitioner. As such, the imposition of condition for grant of licence in favour of the petitioner by the Sabhapati of the Panchayat Samiti cannot be sustained.

25. Mr. Moitra further pointed out that the change of the days for holding the Hat by the petitioner was not recommended either by the Police or by the Block Development Officer. Both the said authorities recommended for change of days of either of the said traders. As such, imposition of condition for grant of renewal in favour of the petitioner, cannot be supported. Mr. Moitra further submitted that the concerned authority at best could have adjusted the days between the petitioner and the respondent No. 8 by altering one day from the petitioner's schedule and one day from the said respondent's schedule, so that a balance could have been drawn between them.

26. Mr. Ashok Dey, learned senior advocate, appearing for the respondent No. 8 submitted that the cowmarket which is now being run by the respondent No. 8 commenced about 90 years back by his grandfather and the said business is being continued till date. Mr. Dey submitted that since the said Hat is being held all through-out on two days in a week, i.e., on every Tuesday and Wednesday for all these 90 years, the schedule of holding of Hat by his client should not be disturbed. Rather, the law and order problem which is apprehended by both the Police and the Block Development Officer for running two Hats in close proximity at the same time on Tuesday and Wednesday in a week, can be avoided by changing the days for holding the Hat by the petitioner to any other day other than Tuesday and Wednesday.

27. Mr. Dey further submitted that change of schedule for holding the Hat is within the competence of the Panchayat Samiti as was held by the Hon"ble Supreme Court in the case of [Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others](#), wherein it was held that the power to specify a day for holding the Hat must be held to be a power incidental to and consequential upon the principal power of issuing a licence u/s 117 of the said Act,

28. Mr. Dey further submitted that the locus standi of the respondent No. 8 to participate in the hearing before the Panchayat Samiti cannot be challenged, as the said respondent was holding a valid licence for carrying on his business on the day when he was allowed to participate in the said hearing by the concerned Panchayat Samiti.

29. Mr. Dey further contended that the respondent No. 8 ail-throughout applied for renewal of his licence right from 1990-91 till 2005, but the grant of renewal of such licence was withheld by the concerned authority unreasonably for such a long period of time and ultimately the concerned authority allowed the prayer for renewal of licence in favour of the said respondent by realizing licence fees for back 15 years at a time. According to Mr. Dey, grant of licence for 15 years at a time by realisation of arrears, is not unauthorized and/or illegal and as such, the right of participation cannot be denied to the said respondent for want of locus.

30. Mr. Dey ultimately submitted that, in fact, the prayer for renewal of the licence made by the petitioner, has not been denied by the authority who have simply regulated the holding of the Hat by the petitioner by fixing two other days, viz., Saturday and Sunday which was done by the authority only for the purpose of avoiding law and order problem in the locality,

31. Mr. Dey, thus, contended that when the power and/or authority of the Panchayat Samiti to regulate the holding of the Hats by fixation of specific days for the respective traders, is recognized by the Hon"ble Supreme Court, as aforesaid, the order impugned cannot be held to be illegal for fixing aifferent days for holding Hut for different traders when such fixation of such schedule was needed for avoiding

the law and order problem in the locality.

32. Mr. Dey further submitted that fixation of time schedule for holding business of the rival traders by the concerned authority to tackle with the law and order problem, cannot be subjected to the judicial scrutiny of this Court.

33. Thus. Mr. Dey supported the said order impugned.

34. Mrs. Mutsuddi, learned Advocate, appearing for the State respondent also supported the said order impugned in this writ petition by submitting that the concerned authority did not commit any illegality by fixing different days for holding cowhut by different traders for avoiding the apprehended breach of peace as per the report of the Police and the Block Development Officer.

35. Let me now consider the submissions of the counsel of the respective parties in the facts of the instant case.

36. Since the right of the respondent No. 8 to participate in the hearing before the Panchayat Samiti was restricted by this Court in the earlier writ petition, let me first of all consider as to whether the said respondent could have overcome the said restriction by fulfilling the conditions which were imposed by this Court upon the said respondent's right to participate in the hearing.

37. Thus, though it is rightly pointed out by Mr. Dey that the validity and/or legality of the renewal in favour of the said respondent cannot be considered in this writ petition, but still then for collateral purpose, this Court for ascertaining the eligibility of the said respondent to participate in the said hearing can certainly consider the validity of grant of such renewal in favour of the said respondent.

38. In this context the earlier litigation between the said respondent and his rival claimants concerning the title over the property on which the said respondent is carrying on his business, are to be considered.

39. Undisputedly, a civil suit is pending between the respondent No. 8 and his other rival claimants concerning the title of the land on which the respondent No. 8 was illegally holding the cowmarket since 1990, It is also an admitted position that the respondent No. 8 was holding the said Hat upto the year 1990 with a valid licence issued by the concerned Panchayat Samiti.

It appears from annexure "T-6" to this writ petition that the following order was passed by Manoj Kumar Mukherjee, J. (as His Lordship then was) on 13th December 1990 in C.O.No. 3934 (W) of 1989:-

As the licence subsequently granted by the Panchayat Samity, to the respondent No. 9 is due to expire shortly on December 31, 1990 to be precise he should be allowed to utilize that licence till then. Thereafter, the Panchayat Samity shall not grant any licence to either of the contesting parties unless and so long appropriate order is not passed by the civil Court in that suit. By way of abundant caution. I place on

record that the learned Civil Court will continue with the said suit until specific order in this regard is passed by a Superior Court staying the proceedings thereof.

40. Thus, it appears from the said order that the Panchayat Samiti was restrained from granting any licence in favour of any of the contesting parties of the civil suit unless appropriate order is passed by the Civil Court in that suit.

41. Subsequently, by an order dated 28th April 1994 passed by Justice Tarun Chatterjee (as His Lordship then was) in C.O.No. 3198 of 1992 arising out of the civil suit between the respondent No. 8 and his rival claimants, as aforesaid, the parties to the said civil suit were permitted to apply before the licensing authority for grant of licence in respect of the cattle-hat situated on the suit property and the licensing authority was directed to consider and dispose of the said applications. if any filed, in accordance with law after giving hearing to the parties and after passing a reasoned order.

42. If both the said orders are read carefully then it goes without saying that the earlier order was neither set aside nor modified by the subsequent order; rather the subsequent order was passed in furtherance with the option left open to the Civil Court for passing appropriate order in this regard. As such, the effect of the injunction order passed in C.O.No. 3934 (W) of 1989 remained in force from 13th December 1990 to 27th April 1994 and the said restraint order during the said period was not lifted by the subsequent order passed in C.O.No. 3198 of 1992, as aforesaid.

43. The said order passed in C.O.No. 3198 of 1992 simply authorised the parties to the suit to apply for grant of licence prospectively. The order passed in C.O.No. 3198 of 1992 never authorised the Panchayat Samiti to consider and/or renew the licence on the basis of the application of the said respondent pending for consideration since 1991. Grant of leave to the parties to apply for grant of licence clearly indicates that the application must be prospective.

44. Thus, it appears that though the Panchayat Samiti was injuncted in favour of the respondent No. 8 for the period from 13th December 1990 upto 27th April 1994, but still then the concerned Panchayat Samiti even did not hesitate to grant licence to the respondent No. 8 by realising licence fees for the said period and thereby helped the respondent No. 8 to regularize his illegal trade for the said period in violation of the order passed in C.O.No. 3934 (W) of 1989, as aforesaid.

45. Furthermore, admittedly the respondent No. 8 carried on such illegal business without any licence for such a long period from 1990-91 to 2004-05 but still then the concerned authority did not take any penal action against the said respondent.

46. It appears from the affidavit in opposition filed by the said respondent that the said respondent applied for renewal of the licence in 1991, 1992, 1993, 1994 and thereafter again on 2005 but still then the concerned authority allowed renewal to

the said respondent No. 8 for the entire period from 1990-91 to 2005-06, though there is nothing on record to show that the renewal for the entire period was even sought for by the said respondent.

47. There is also no material on record wherefrom this Court can come to the conclusion that even the direction which was given by Justice Tarun Chatterjee (as His Lordship then was) in C.O.No. 3198 of 1992 being annexure "P-6" to this writ petition was at all followed or not by the concerned authority while granting such renewal. It appears from His Lordship's said order that His Lordship made it clear that in the event any such application is submitted by the parties to the suit then the concerned authority will consider and dispose of the same by a reasoned order after giving hearing to the parties. There is no material on record from which this Court can come to the conclusion as to whether any opportunity of hearing was given to the defendant in the pending civil suit or not and further as to whether any reasoned order was passed by the concerned authority prior to grant of licence or not.

48. The Panchayat Samiti has also not come forward to explain its conduct despite service of notice upon the said Panchayat Samiti.

49. Thus, if all these sequence of events are taken together, then this Court has no hesitation to hold that the concerned Panchayat Samiti is carrying an illegal trader on its own shoulder and is behaving step-motherly with the petitioner by not renewing his licence, though there is no allegation of default against the petitioner.

50. On plain reading of the provisions contained in Sections 116 and 117 of the said Act, it appears that licence is to be obtained from the Panchayat Samiti before commencement of the business and such licence is renewable annually from year to year. Licence is always prospective. As such, the illegal trade cannot be regularised by grant of licence with retrospective effect.

51. That apart, when the business was discontinued by way of injunction passed by this Court, as aforesaid, the concerned authority ought not to have granted renewal of licence to regularise the illegal trade of the respondent No. 8 even for the period during which his business was discontinued pursuant to the order of this Court. The concerned authority at best could have issued fresh licence for the period subsequent to the passing of the order on 28th April 1994 in C.O.No. 3198 of 1994, as aforesaid, by following the directions provided therein and also subject to the satisfaction of conditions regarding renewal of such licence as contained in the West Bengal Panchayat Act, 1973.

52. However, since the legality and/or validity of the grant of renewal of the licence in favour of the respondent No. 8 is only an incidental issue in this writ petition, this Court does not want to consider about the legality and/or validity of such renewal in further details. But this much can be said by this Court that the grant of renewal of licence in favour of the said respondent for back period of 15 years at a time is

illegal. However, I make it clear that these findings are restricted to the consideration of this writ petition only.

53. The other important fact which should be taken note of in this connection is that the concerned authority did not feel any necessity for changing the days of holding the Hat by the petitioner prior to the submission of the representation made by the private respondent in this regard.

54. The proceeding for changing the schedule of holding the Hat by the petitioner was initiated initially on the basis of a representation made by the respondent No. 8 who applied for alteration of the petitioner's schedule for avoiding competition between two rival traders. The apprehension of breach of peace was never felt either by the Police or by the Block Development Officer or the Panchayat Samiti earlier. The apprehension of breach of peace was felt for the first time in course of hearing regarding the grant of renewal of licence in favour of the petitioner by the Panchayat Samiti. Even the basis for formation of such opinion regarding the existence of apprehension of breach of peace has not been disclosed by the said authorities. Occurrence of any untoward incident or at least any complaint in this regard has not been mentioned by either of the authorities.

55. In any event, this is not a proceeding connection with which the justification for formation of opinion regarding the breach of peace by the concerned authorities, is required to be considered by this Court in great details.

56. The facts remain that on the date when licence was granted to the respondent No. 8 vide annexure "R-6" to the affidavit-in-opposition there was only one trader, viz., the petitioner who was carrying on the said business legally and as such, even in case of any apprehension of breach of peace, the concerned authority ought to have directed the respondent No. 8 who was getting a new legal entry in the business, to hold the said business on the days other than the days on which the petitioner is holding such hat pursuant to a valid licence and/or the order of the Court. In any event, an illegal trader cannot be favoured by the statutory authority at the cost of the legal trader.

57. The impugned order is, thus, set aside.

58. The concerned authority, viz., the Chandipur Panchayat Samiti is thus directed to renew the licence of the petitioner for the period from 2005 to 2006 without disturbing the petitioner's schedule of holding of such Hat on Tuesday and Wednesday in every week. Such renewal of licence should be granted by the concerned Panchayat Samiti positively within a period of one week from the date of deposit of the requisite fees therefore with the concerned respondent and if such deposit is made by the petitioner then the continuation of the petitioner's business till the grant of such renewed licence to the petitioner, cannot be treated as illegal continuation of business by the petitioner.

59. It is, however, made clear that in the event the petitioner fails to deposit the requisite fees with the concerned Panchayat Samiti within a week from date, then the concerned authority will take its own decision in accordance with law.

60. Since apprehension of breach of peace has been reported by the Police and the Block Development Officer, the concerned authority may direct the respondent No. 8 to alter and/or change the schedule of his business suitably by following the decision of the Hon"ble Supreme Court in the case of D. Nataraja Mudaliar (supra) wherein the power of the Panchayat Samiti to fix the dates for holding such hat by the respective traders has been recognised by the Hon"ble Supreme Court in paragraph 5 thereof which is as follows :-

5. This Court in V.T. Khanzode v. Reserve Bank of India has followed the dictum of Lord Selborne in Great Eastern Railway case and reaffirmed the principle that the doctrine of ultra vires in relation to the powers of a statutory corporation have to be understood reasonably, and so understood, whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised ought, not (unless expressly prohibited) to be held by judicial construction, to be ultra vires. It had earlier been laid down by a Constitution Bench in the case of State of U.P. v. Batuk Deo Pati Tripathi that a power to do a thin necessarily carries with it the power to regulate the manner in which the thing may be done. The High Court failed to appreciate that the power to grant a licence for the holding of a hat or fair u/s 117 of the Act necessarily carries with it the power to specify a day on which such hat or fair shall be held. Such power to specify a day must be held to be a power incidental to or consequential upon the principal power of issuing a licence u/s 117 of the Act for holding of a Hat or fair. The rules or the absence of it do not detract from the substantive power conferred by a statute. The essence and content of the power of a Panchayat Samiti u/s 117 of the Act is issuance of a licence for the holding of a Hat or fair and not mere maintenance of sanitation, health and hygiene as held by the High Court.

The application, thus, stands allowed. There will be, however, no order as to costs.

Urgent xerox certified copy of this Judgment, if applied for, be given to the parties, as expeditiously as possible.

Later:

After delivery of the Judgment, the learned Advocate, appearing for the respondents, has prayed for stay of operation of this Judgment. Having considered, such prayer is refused.

On the prayer of the learned Advocate for the petitioner, let a plain copy of the operative portion of this Judgment duly countersigned by the Assistant Registrar (Court) be given to the learned advocate-on-record for the petitioner upon the usual undertaking.