

(2002) 08 CAL CK 0013

In the Calcutta High Court

Case No : M.A.T. No. 1857 of 2002 and C.A.N. No. 5359 of 2002

Arindam Ghosh and Another

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 21-08-2002

Acts Referred:

Constitution of India, 1950 — Article 226

West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Spirit and Certain other Intoxicants) Rules, 1993 — Rule 8, 9, 9(3), 9(4)

Citation : (2003) 1 CALLT 283

Hon'ble Judges : Ashok Kumar Mathur, C.J.; Jayanta Kumar Biswas, J

Bench : Division Bench

Advocate : Anindya Mitra, Satya Raj Banerjee, Aniruddha Chatterjee and Ajoy Shankar Sanyal, for the Appellant; Ajit Kumar Panja, Biswajit Basu, Susenjit Banik, Debashis Kar Gupta and S.N. De, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Mathur, C.J.—This is an appeal directed against the order passed by a learned single Judge dated 23.05.2002 whereby the learned single Judge has allowed the writ petition and restrained the Collector of Excise from allowing the respondent Nos. 7 & 8 to run the Foreign Liquor "off shop at 28, Hem Chandra Naskar Road, Beliaghata, Kolkata-10. The learned single Judge directed the respondent Nos. 7 & 8 to stop running of the liquor shop forthwith at the present site. He further directed that respondent Nos. 7 & 8 may offer any alternative site after following the mandate of law and the Excise Authorities would make proper enquiry in accordance with law and conclude the same within four weeks and thereafter take appropriate decision in the matter. Aggrieved against this order the present appeal has been filed by the respondent Nos. 7 & 8.

2. Brief facts which give rise to this appeal are that the writ petitioner challenged the site on which Foreign Liquor "off shop licence was granted in favour of the respondent Nos. 7 & 8 at 28, Hemchandra Naskar Road, Police Station Beliaghata

(hereinafter referred to as the said premises). The petitioner was not the rival applicant for grant of licence, nor is he challenging the grant of the liquor licence in favour of the respondent Nos. 7 & 8. But his challenge is the selection of site on which the present shop has been permitted to be run. According to the writ petitioner, the site selection was not proper as it is against the provision of the West Bengal Acts and Rules.

3. The writ petitioner is a resident of 28, Hemchandra Naskar Road, Beliaghata, Kolkata, within the Maniktala Assembly Constituency. It is alleged that the premises from which this liquor shop is being run is situated in a very busy but stop and around it there are hospitals like Beliaghata I.B. and I.D. and B.G. Hospital, Dr. B.C. Roy Polio Clinic, Cholera Research Institute etc. It is also alleged that there are Nursery schools like Model Primary School run by the Kolkata Municipal Corporation within the close vicinity of the said premises. It is alleged that there are a few Doctors' chambers, Nursing homes, Milk Depot etc. near the Bus stop. It is alleged that the locality is a middle class locality. It is alleged that when the writ petitioner came to learn about the establishment of a Foreign liquor shop from the premises he and other local inhabitants of that locality contacted the Officer-in-Charge of the Police Station to prevent the establishment of liquor shop in the premises, but without any result. They made a mass representation to the Government for withdrawal of the permission for establishment of this shop in this premises, but without any result. It is alleged that the respondent Nos. 7 & 8 filed a writ petition before this Court which came to be registered as W.P. No. 1168 (W) of 2002 for police help in running the shop. It is alleged that this writ petition came to be disposed of by this Court with a direction to the police to render all possible assistance to the respondents Nos. 7 & 8.

4. However, we are only concerned in the present case about the establishment of the shop at the present premises. It is alleged that an advertisement was issued under the West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Spirit and Certain other Intoxicants) Rules, 1993 (hereinafter referred to as "Rules"). The Collector, it is alleged, after following the due procedure selected a site for establishment of a liquor shop at 122/7, Beliaghata Main Road and its vicinity. In this connection, it may be relevant to mention that a detailed procedure has been prescribed for site selection in the Rules of 1993. As per Rules 1993, an advertisement has to be issued and after receiving certain objections from the various authorities site is to be selected. In this connection, the relevant provision which has bearing on the subject is Rule 9(4). According to Rule 9(4) of the Rules, the Collector shall send copies of the notice as referred to in Sub-rule (3) to the persons/authorities of the local areas, namely, (i) the Member of Legislative Assembly, (ii) the Sabhadhipati of the Zilla Parishad, (iii) the Chairman of each Municipality, (iv) the Municipal Commissioner or the Chief Executive Officer of each Municipal Corporation, and (v) the Chief Executive Officer of each notified area inviting their opinions as regards proposed new site falling within their respective jurisdiction within forty-five days from the date of

the said notice. Such authorities have to send their opinion to the Collector within the specified time. Therefore, the idea is that before selecting the site for grant of a liquor licence the opinion of all the 5 (five) authorities has to be elicited. In the present case, it appears that for the site selection no opinion of the Member of the Legislative Assembly was sought for establishment of a shop in the present premises-in-question as the premises-in-question falls within another Constituency, i.e., Maniktala. It may be relevant to mention here that, in fact, objections were invited for establishment of a shop at Beliaghata or its vicinity which falls in Beliaghata Assembly Constituency, but the premises at which the liquor shop is permitted to be run falls in another Constituency i.e. Maniktala Constituency, and the MLA of that Constituency was Sri Paresh Paul and no objection was invited from him. The issue which was raised before us and also before the learned single Judge by the learned counsel for the respondent/writ petitioner was that, in fact, the shop in question was established in Maniktala Constituency whereas the site was selected at 122/7, Beliaghata Main Road or its vicinity whereas the Collector of Excise granted the permission to the successful bidder in another Constituency i.e. 28 Hemchandra Naskar Road for which no objections were invited from the concerned MLA of that area. Therefore, the question is, whether the present site which has been approved by the Collector of Excise for running the Foreign liquor shop which falls in Maniktala Constituency any notice was sent to the MLA inviting his opinion. It was contended by the learned counsel for the appellant that notice was sent to the MLA for establishment of the shop and our attention was invited to the notice. The learned single Judge after going through the record found that the notice which was invited for establishment of the liquor shop was in respect of 122/7, Beliaghata Main Road and Mr. Paresh Paul was not the MLA of that area and he need not raise objection to running of the shop at 122/7, Beliaghata Main Road. In fact, the shop has been established in another MLA's Constituency i.e. Maniktala, of which Sri Paresh Paul was the MLA and no objection was invited from him for these premises which fall in his Constituency. It was also pointed out that some of the shops were established in his Constituency like VIP Road, Ultadanga Road Railway Station and its vicinity and he had no objection for establishment of shop in that area. But for the establishment of a shop at 28, Hemchandra Naskar Road, Kolkata-10 no such objection was invited from him. In fact, the notice which was sent was with regard to the shop to be established in 122/7, Beliaghata Main Road or its vicinity in respect of which he had no jurisdiction to give his opinion as that did not fall within his Constituency. But when he learned that the shop is being established in his Constituency at 28 Hemchandra Naskar Road, he raised an objection to the Collector. The plea taken by the State was that the notice was sent to Sri Paul but in the notice which was sent to Mr. Paul there was no indication that the shop is going to be established in his Constituency at 28, Hemchandra Naskar Road. Therefore, the learned counsel for the respondent/writ petitioner raised the objection that in so far as such selection of a site in another MLA Constituency is concerned, proper procedure for establishment of shop was not followed. This violates the statutory

Rule 9(4) as no objections were not invited from the MLA of that area. This objection prevailed with the learned single Judge. However, the learned counsel for the appellant Mr. Mitra submitted that this procedure is directory and not mandatory and invited our attention to the decisions in the case of *State of U.P. Vs. Manbodhan Lal Srivastava, , and Ramchandra Keshav Adke (Dead) by Lrs. and Others Vs. Govind Joti Chavare and Others*, in support of his contention that what is a directory procedure and what is a mandatory procedure. In the case of *Manbodhan Lal Srivastava (supra)* Their Lordships interpreted Article 320(3) of the Constitution and Their Lordships held that it is not a mandatory but it is a directory procedure because it does not confer any right or privilege on an individual public servant nor any constitutional guarantee of the nature contained in Chapter-I of that part particularly Article 311. In the case of *Ramchandra Keshav Adke (dead) by LRs. and Others (supra)* Their Lordships held that the Court should try to keep at a real intention to the nature of the Legislature by ascertaining upon and review of the language, subject matter and importance of the provision in relation to general object intended to be secured, the mischief if any to be prevented and the remedy to be promoted by the Act. Therefore, it is for the Courts to ascertain whether the nature of the provisions should be interpreted as a directory or mandatory. In the present case, this is a very salutary provision that before establishing a liquor shop in a particular area opinions of the MLA, Sabhadhipati of the Zilla Parishad, the Chairman of each Municipality, the Municipal Commissioner or the Chief Executive Officer of each Municipal Corporation and the Chief Executive Officer of each notified area should be elicited whether it would be advisable to have a liquor shop in a particular area or not. In fact, a detailed procedure which has been laid down cannot be said to be a mere formality and it cannot be observed in breach. The detailed procedure has been laid down for the benefit of the public only whether it would be advisable to have liquor shop in that locality or not and who could be the better representative of public other than MLA of that area or President of Zilla Parishad or Chairman of Municipality or Corporation. We are not called upon to decide whether all the provisions contained in the Rule may be treated as mandatory or directory. At present our Issue is, whether Rule 9(4) which lays down for inviting the objections of the ML of the Constituency, the President of the Zilla Parishad, the Chairman of each Municipality, the Municipal Commissioner or the Chief Executive Officer of each Municipal Corporation and the Chief Executive Officer of each notified area should be read as a mandatory or not. The language of the Rule 9(4) says that the Collector "shall" issue notice and it is not "may". Therefore, "shall" has to be read as a mandatory and not as "may", that is a directory. The Rules cast a duty on the Collector that he shall send copies of the notice under Sub-rule (3) to the aforesaid authorities. Therefore, it is couched in a mandatory language for eliciting the opinions of the elected Representatives of that area. It has a public purpose also, i.e. the elected Representatives of that area who are all well aware of that locality and they represent the people at large, their participation in selecting the place for establishment cannot be treated as a mere formality, without eliciting their

opinion it will certainly vitiate the whole exercise of establishment of a liquor shop in that area.

5. Therefore, looking to the language as well as the public purpose involved in that matter we hold that Rule 9(4) is mandatory and breach thereof would certainly vitiate the decision of the authorities.

6. In this case the learned single Judge also appointed a Special Officer to find about the areas around the present shop. According to Rule 8 it says that no liquor shop shall be established in or around the area of a hospital or educational institution though no distance had been mentioned. Only it is said close proximity of these hospitals and educational institutions where no liquor shop should be established. How much should be the distance that has not been pointed out in the Rule. But the expression used in the Rule is close proximity and in this connection reference was made to one writ petition, i.e. W.P. 17144(W) of 2001 where the learned single Judge held that the close proximity would not be less than a distance of at least 300 yards. As per the Special Officer's Report he has given the distance of the hospitals in and around that area and the learned single Judge keeping in view the distance of 300 yards i.e. 1000 feet has also found that these areas fall within the zone of the parameter laid down by this Court and he also found that these two hospitals i.e. B.C. Roy Polio Hospital (old) and B.C. Roy Polio Hospital (new) are within the close proximity i.e. 1000 feet as per the Special Officer's Report. Therefore, he found that it is in violation of Rule 8.

7. The learned counsel for the appellant also has tried to persuade us with reference to the Special Officer's Report that both these so-called hospitals are in fact not hospitals of that kind and they are only clinics and as per the site plan also they do not come within the prohibited area under Rule 8. This is a question of fact which the learned single Judge on the basis of the Special Officer's Report has found to be within the radius of 1000 feet, we do not see any reason to take different view of the matter. The question of close proximity would only mean a reasonable distance and the reasonable distance in the present case has been taken by the learned single Judge to be 1000 feet. That cannot be said to be wrong in any manner.

8. In this view of the matter we are of the opinion that the view taken by the learned single Judge cannot be said to be wrong and we do not find any merit in this appeal and the same is hereby dismissed.

9. We leave it open for the authorities to proceed in the manner as directed by the learned single Judge by giving liberty to the appellants for any site selected by them at 122/7, Beliaghata Main Road or its vicinity in the light of the discussion held by us above.

No order as to costs.

J.K. Biswas, J.

10. I agree.

Later on: 21.8.02

If urgent xerox certified copies of this judgment and order is applied for the same may be made available to the learned counsel for the parties upon compliance of all the formalities.