

(2003) 02 AP CK 0030

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 8775, 9722 and 11713 of 2000

B. Muralidhar and Another

APPELLANT

Vs

Superintendent of Prohibition and Excise and Others

RESPONDENT

Date of Decision : 07-02-2003

Acts Referred:

Andhra Pradesh (Indian Liquor and Foreign Liquor) Rules, 1970 — Rule 31(4)
Constitution of India, 1950 — Article 14

Citation : (2003) 2 ALD 736 : (2003) 4 ALT 485

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : M.V. Durga Prasad, for the Appellant; Government Pleader for Respondent Nos. 1 and 2 and P. Prabhakara Rao, in WP No. 8755 of 2000, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—The three writ petitions can be disposed of by a common order as the question raised is in relation to the validity of Clause (e) of Sub-rule (4) of Rule 31 of the A.P. Indian Liquor and Foreign Liquor Rules, 1970 ("the 1970 Rules").

2. In W.P, No.11713 of 2000, Rule 31(4)(e) of the Rules is challenged directly. However, in W.P. Nos.8775 and 9772 of 2000, Part IV (e) of the notification issued on 1-5-2000 which is in pari materia with Rule 31(4)(e) of the Rules is in question.

3. Before noticing the facts, it is necessary to point out the legal framework for allotment/grant of Form IL-24 licences under the 1970 Rules as well as A.P. Excise (Indian and Foreign Liquor Retail Sale Conditions of Licences) Rules, 1993 and A.P. Excise (Lease of right to sell Indian Liquor, Foreign Liquor and Beer in retail under IL-24 Licences) Rules, 1998 (hereafter called "the 1998 Rules"). In the State of Andhra Pradesh, the procedure adopted for grant of licence under the Rules or for that matter any licence under 1970 Rules has undergone change

from time to time. The State was brought under prohibition in 1994. There was a total ban on the manufacture, sale and consumption of arrack and Indian made foreign liquor and only manufacture and sale of toddy was allowed. However, during 1997-98, the Government changed the policy and lifted prohibition insofar as Indian made foreign liquor is concerned. The 1998 Rules were promulgated to regulate grant of licence in Form IL-24. At the relevant time, the licence was to be granted after determining the number of shops in an area by conducting auction. Subsequently, the procedure was changed amending Rule 2 of the 1998 Rules introducing the system of drawal of lots wherever there are more than one applicant for the same shop. With effect from 31-3-1999, Rule 2 of 1998 Rules was again amended making way for grant of IL-24 licence on an open licence system to be governed by the 1970 Rules and 1993 Rules. Rule 31 of the 1970 Rules provides for procedure for grant of licence.

4. At the relevant time, the procedure contemplated is as follows. The shops shall be notified by issuing Gazette notification as per Rule 2 of the 1998 Rules. Where there is only one applicant for shop, the procedure prescribed under Rule 31 (1) (a) of 1970 Rules is followed and licence is granted if the applicant is solvent and eligible for grant of licence. Sub-rule (4) of Rule 31 of the 1970 Rules reads as under.

31(4) The following procedure shall be adopted for the selection of applicants for grant of IL-24 licence in respect of shops notified under Rule 2 of the Andhra Pradesh Excise (Lease of Right to Sell Indian Liquor, Foreign Liquor and Beer in Retail under IL-24 Licences) Rules, 1998.

(a) Where there is only one application for a shop, the procedure prescribed under sub-rule (1) (a) shall be followed.

(b) Where there are more than one application for a shop, the Excise Superintendent shall make such enquiry as he may think necessary to ascertain the bona fide of the applicants and their solvency and other particulars furnished in the application to determine their eligibility or otherwise for the grant of licence as per rules. The selection for grant of licence among the eligible applicants shall be by drawal of LOT by the Collector in the presence of the applicants who are available at the time of selection as notified under Rule 2 of the Andhra Pradesh Excise (Lease of Right to Sell Indian Liquor, Foreign Liquor and Beer in Retail under IL-24 Licences) Rules, 1998.

(c) In case the selected applicant is not willing to take the licence, the deposit shall stand forfeited to the Government.

(d) The successful applicant shall sign his name or affix his thumb impression against the relevant entry in the register maintained for the purpose.

(e) Where the successful applicant is not available in the place of selection, the deposit submitted by him, shall be forfeited and the selection may be made by taking a fresh LOT after deleting his name. The procedure shall be continued till

the selection of applicant for the shop is finalised.

5. A plain reading of Sub-rule (4) of Rule 31 would show that where there is only one applicant, the licence shall be issued to the applicant subject to his eligibility and qualification. Where there are more than one application for a shop, the licensing authority namely, the Excise Superintendent shall make such enquiry so as to ascertain the bona fides of the applicants and the selection for grant of licence among eligible applicants shall be by drawal of lots by the District Collector in the presence of the applicants who are available at the time of selection as notified in Rule 2 of the 1998 Rules. After a person is selected in the lottery and is not willing to take licence, the deposit of 1/3rd annual licence fee along with the application shall be refunded to the Government. When an applicant is selected in the lottery, he is required to sign his name or affix his thumb impression against the relevant entry in the register maintained for the purpose. Clause (e) of Sub-rule (4) of Rule 31 of the 1970 Rules provides that where the successful applicant is not available at the place of selection, the deposit submitted by him shall be forfeited and selection shall be continued by taking a fresh lot after deleting his name. The same procedure is continued till the selection of a proper applicant for the shop is finalised. Therefore, one thing is very clear that when there are more than one application, the selection for grant of licence among eligible applicants shall be by drawal of lots in the presence of the applicants who are available at the time of selection. Be it also noted that as per the notification issued by the first respondent on 1-5-2000 in accordance with Rule 2 of the 1998 Rules, it is permissible for an applicant to be represented by a power of attorney holder.

6, Rule 31(4)(e) of the 1970 Rules is challenged on the ground that it is arbitrary. It is submitted that as the Rule provides for forfeiture of the deposit made by the applicant if he is not available at the place of selection, it is arbitrary and irrational. Except raising a ground that the Rule is arbitrary, no attempt is made to substantiate or demonstrate the arbitrariness before this Court. Be that as it may, a reading of Sub-rule (4) of Rule 31 shows that an applicant not willing to take the licence or successful applicant who is not available at the time of selection are treated alike and the deposit made by both of them shall stand forfeited. When a selected candidate goes back and refuses to take the licence stands to lose his deposit. A person who is not available at the time of selection cannot have any right to say that his deposit shall not be forfeited. In one sense, a person who is selected and refuses licence and successful applicant who is not at the place of selection are on the same footing and if the deposit of a successful applicant who is not available at the place of selection is not forfeited, the same would result in discrimination between a candidate who is selected and not willing and a candidate who is not available at the place of selection.

7. I fail to see any arbitrariness in the Rule. It is basically intended to prevent such of the persons who speculate and take a chance while applying for IL-24

licence. That is the reason why Sub-rule (4) of Rule 31 as well as Clause (b) of Sub-rule (4) of Rule 31 require the Excise Superintendent to ascertain the bona fides of such applicants and their solvency before commencing the selection procedure. There is no irrationality in the Rule. The right to trade in liquor and intoxicant substances is not a fundamental right. No person can claim to have a fundamental right to do business in liquor. The State has absolute privilege in dealing with intoxicant substances. The right being *res extra commercium* cannot be claimed as a matter of fundamental right, though by reason of various decisions of the Supreme Court, even in liquor trade the principle of equality and equal protection of laws has been made applicable. A reference may be made to the decision of the Supreme Court in *Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others*, . A Constitution Bench of the Supreme Court, after referring to various authorities, summarised the law on the subject relating to right to carry on trade or business in potable liquor. In paragraph 60 (b), (f), (g) and (m), it was laid down as under.

(b) The right to practise any profession or to carry on any occupation, trade or business does not extend to practising a profession or carrying on an occupation, trade or business which is inherently vicious and pernicious, and is condemned by all civilised societies. It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium*, (outside commerce). There cannot be business in crime.

(f) For the same reason, again, the State can impose limitations and restrictions on the trade or business in potable liquor as a beverage which restrictions are in nature different from those imposed on the trade or business in legitimate activities and goods and articles which are *res extra commercium*. The restrictions and limitations on the trade or business in potable liquor can again be both under Article 19(6) or otherwise. The restrictions and limitations can extend to the State carrying on the trade or business itself to the exclusion of and elimination of others and/or to preserving to itself the right to sell licences to do trade or business in the same, to others.

(g) When the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business.

(m) The restrictions placed on the trade or business in industrial alcohol or in medicinal and toilet preparations containing liquor or alcohol may also be for the purposes of preventing their abuse or diversion for use as or in beverage.

8. When the respondents issued notification inviting applications for grant of licence for different places and all the petitioners applied knowing fully well the conditions for participating in the selection, they cannot be heard that the Rule providing for forfeiture of deposit in certain circumstances is arbitrary. The State

is entitled to confer a right to participate in the selection for grant of IL-24 licence subject to conditions as contained in Sub-rule (4) of Rule 31 and the notification dated 1-5-2000.

9. In *Sri Narasimha Wines and Others Vs. The Proh and Excise Superintendent and Others*, , a Full Bench of this Court, to which I was a member, considered the validity of Sub-rule (9) of Rule 25 of the 1970 Rules which provide that the licensee should pay the entire licence fee whenever the licence is granted during the excise year. The Rule was questioned as arbitrary violating Article 14 of the Constitution. This Court, after referring to the judgments of the Supreme Court as well as this Court in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, , *Sham Lal and Others Vs. State of Punjab*, , *M. Subba Rao v. Superintendent of Excise 1984 (2) APLJ 203*, *Rajaheel Wine Merchants and Others Vs. The Commissioner of Excise and Others*, , *R. Gupta v. Govt. of A.P. 1996 (1) ALT 562 (DB) : 1996 (2) ALD 408*, *State of Orissa and others Vs. Narain Prasad and others*, etc. etc., , *Sri Rama Wines and Others Vs. Excise Superintendent, Adilabad*, , *Panna Lal v. State of Rajasthan*, : [1976]1SCR219 , *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, , and *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, , observed as under:

Further the question which arises for consideration is as to whether the petitioners having voluntarily offered to take part in the auction can now be permitted to turn round and contend that the said provisions cannot be implemented. The answer to the said question must be rendered in the negative. The matter relating to grant of licence is a matter of contract. The petitioner, as noticed hereinbefore, without any demur whatsoever participated in the auction knowing fully well the condition as regards payment of licence fee. They did not make any protest..... A person who intends to carry on business and takes part in auction, is expected to calculate the profit and loss he may incur in the venture before doing so. He would be presumed to have taken part in the auction knowing fully well that even if he were required to pay the licence fee despite the fact that he would not be able to carry out business for the whole excise year, he would earn some profit.

10. The Full Bench also observed that the petitioners cannot be heard to say that Clause 8 of the Schedule appended to the Rules is unreasonable and attracts the wrath of Article 14 of the Constitution.

11. Coming to the facts of the case, in W.P.No.8775 of 2000, it is the case of the petitioners that as their aunt Smt. Premalatha Khandelval was hospitalized at Apollo Hospital, Hyderabad, they left the place, that they applied for licence at Yellandu and that they requested their GPAs, one B.Satyanarayana and K.Vinod Kumar respectively to be present at the time of selection and that their GPA was present. This fact is not denied. The register maintained in accordance with Clause (b) of Sub-rule (4) of Rule 31 of the 1970 Rules is produced before me. The selections for the shops at Yellandu were held on 9-5-2000 vide relevant entries at Sl.Nos.12 and 13. When the petitioners' names were called, they were

absent and, therefore, further selection was held. In view of the record maintained during the course of official business, the submission of the learned Counsel for petitioners that the GPA holders of the petitioners were present at the time of selection cannot be accepted. In a matter of this nature where there are more than one applicant applying for a shop at Yellandu, the submission that the petitioners could not be present at the time of selection due to other reasons cannot be accepted.

12. In W.P. No.9722 of 2000, the petitioner applied for licence in Form IL-24 to carry on business at Tallada. It is his case that he was present at the time of selection, but he could not be present when his name was called as he had to go out for attending nature's call. This is not proved by producing any contemporaneous document before this Court. In fact, no such representation was made. Be that as it is, Clause (b) of Sub-rule (4) of Rule 31 is very clear that the District Collector has to conduct the lots in the presence of the applicants who are available. Merely because the petitioner was present at the beginning of the selection and not present at the time of selection is no reason for not applying Clause (b) of Sub-rule (4) of Rule 31 of the 1970 Rules. The record shows that the petitioner was not present when he was called.

13. In W.P.No. 11713 of 2000, the petitioner applied for a licence at Bonkal for which selections were held on 9-5-2000 and when his name was called, he was not present. However, it is submitted that he was present at the beginning of selection, but as there was no place in the hall at the time of selection, he was waiting outside, but later he became sick and was taken to the hospital of Dr.Prasad. He alleged that he instructed his son to be present at the time of selection. No averment is made in the affidavit that his son was in fact present at the time of selection. The register produced before me shows that the petitioner was not present when his name was called. Therefore, it cannot be said that the lottery conducted was illegal.

14. After perusing the affidavits and the register produced before this Court, it is clear that the case of the petitioners cannot be accepted. In any view of the matter, I would hasten to add that it is essentially a question of fact whether or not the petitioners were not present when their names were called. The office record produced before me belies the submission of the learned Counsel for the petitioners. Therefore, holding that Rule 31(4)(e) of the 1970 Rules does not suffer from any arbitrariness or irrationality and the same does not violate Article 14 of the Constitution of India, the writ petitions are dismissed. There shall be no order as to costs.