
(1962) 03 OHC CK 0003

In the Orissa High Court

Case No : Criminal Appeal No. 124 of 1961

Balasore Municipality

APPELLANT

Vs

Fanidranath Ghosh and Others

RESPONDENT

Date of Decision : 01-03-1962

Acts Referred:

Orissa Municipal Act, 1950 — Section 297, 298, 301(2), 303, 337
Orissa Municipal Rules, 1953 — Rule 585

Citation : (1962) 28 CLT 266

Hon'ble Judges : R.K. Das, J

Bench : Single Bench

Advocate : B.M. Patnaik and S.S. Basu, for the Appellant; S.C. Roy, for the Respondent

Judgement

R.K. Das, J.—This appeal is directed against an order dated 29-4-1961 passed by (Shri U.C. Misra, Magistrate, 1st, Class, Balasore, acquitting the Respondents of an offence u/s 383 of the Orissa Municipal Act, 1950, (hereinafter referred to as ? the Act?).

2. The case of the complainant is that the Respondents who owned a private market known as the ?Ghose Market? continued to run the same for the year 1958-59 without obtaining a valid license, ,under Section 297 of the Act from the Balasore Municipality, and thus made themselves liable to punishment u/s 383 of the said Act.

3. The Respondent do not deny the ownership of the market, but they denied the fact of running the same without license. Their further contention was that the Municipality? does not grant a license ?as such, but it grants only a receipt in taken, of payment of the licence fee. But as the quantum of the license fee itself is in dispute, they have not paid the same.

4. The complainant Municipality examined only the Tax-Daroga in support of their case. According to his evidence, the accused-Respondents are the owners of the

private market known as the 'Ghose Market' situate within the Municipal area of Balasore for the last 20 to 30 years; and for the year 1958-59 they had neither obtained the licence, nor paid the fees of Rs. 650/- demanded by the Municipality. He admitted that no written licence is given but after payment of the money, in the receipt itself it is mentioned that the money is received towards the licence fee. He further admitted in his cross-examination that a Letter Ext. A dated 23-2-1959 was sent by the Municipality to the accused-Respondent Fanindranath Ghose calling upon him to submit his accounts to the Municipality for the purpose of fixation of the licence-fee for the year 1958-59. No witness was examined on behalf of the defence. The main question for consideration is whether in fact the accused-Respondents made any application to the Municipality for running their private market for the year 1958-59, and obtained a licence for the purpose.

5. The learned trying Magistrate found that the Respondents had in fact made an application for renewal of the licence for the year in question and thus acquitted them. On this point the following observation in his judgment is somewhat pertinent:

From the record it appears that the accused persons had applied for renewal of the licence for the year 1958-59 as provided, u/s 297 of the Municipal Act.

It is not understood how he got from the record that the accused persons made any such application. In fact, no such application has at all been proved to have been filed before the Municipality for renewal of the licence for the year in question. Learned Counsel for the Respondent drew my attention to a list of two documents said to have been filed by the defence, one a letter dated 23-2-1959 sent by the Balasore Municipality to the accused Fanindranath Ghose (Ext. A), and the other, a copy of a letter purported to have been sent by the accused Fanindranath Ghose on 23-2-1959 to the Municipality asking for license for the Ghose Market for the year 1958-59. In fact, the latter document is of very great importance for the purpose of the case. If in fact the accused persons made any such application for license then renewal of the license is more or less a formal one unless of course the Municipality for any sufficient reasons refuse to grant it. This letter though it appears to have been proved whether it is the accused Fanindra or somebody else. It is not understood why such an important document which strikes at the very foundation of the case was not at all brought to the notice of P.W. 1 to show that in fact the accused persons did make an application for renewal of the licence, though the first letter. Ext. A, was shown to him. It was never the contention of the Respondents at the trial that they submitted any such application. According to them the controversy was about the quantum of license fees. If in fact such an application was filed before the Municipal authorities on 23-2-1959, the accused Respondents could as well have called for the original from the Municipal Office, and proved the said letter in accordance with law. The learned Magistrate was not justified in taking notice of such a document merely because it was found in the records. The learned

Counsel for the Appellant contended that it is doubtful if actually the said letter was filed along with Ext. A and in any case it should be ignored. No doubt, there is some justification for his contention. In any case that application for license not having been duly proved no notice can be taken of the same. Once the so called application is ruled out, there is nothing in the evidence to show that in fact any application was made by the Respondents for renewal of the license for the year in question.

6. Much reliance was placed by learned Counsel for the Respondents on Ext. A, wherein the accused Fanindranath Ghose was called upon to submit return of accounts of the market in question to enable the Municipality to fix the license fee for the year 1958-59. It was contended that had there been no previous application for renewal the Municipality would not have written such a letter and in any case once the Municipality has called for the accounts for fixation of the license fee for the year in question, it may be inferred that they had no objection to the grant of the license, but only the quantum of the fee was in dispute. This contention cannot be accepted in view of the clear provision in Section 297 of the Act which lays down that no person shall open a new private market or continue to keep open a private market unless he obtains from the Municipal Council a license for the purpose, and for such license an application shall have to be made by the owner of the place in respect of which the license is sought, not less than thirty and not more than ninety days, before commencement of the financial year. The license under this section is granted only for a period of one year and expires at the end of the year. Thus whether it is an old market or a new one, a license has to be obtained for running the same and the license is valid only for one year. The license fee is to be calculated in the manner provided u/s 298. Under, Clause (8) of Section 337, once an application for renewal of the license is made, the licensee shall be deemed to have been allowed for the year unless an order to the contrary is passed by the Executive Officer within thirty days from the date of the applications. If, however, the Municipality refuses to grant any license, or suspends, or cancels or modifies the same the reasons there for have to be communicated to the Appellant

7. It was contended by the learned Counsel for the Respondents that since the Ghose Market is an old market and the license was to be given as a matter of course, even or application would be sufficient for the purpose. It may be mentioned here that it was never the case of the Respondents that they had ever made an oral application at any time. Moreover, the provisions of Sections 297 and 337 completely rules out the theory of an oral application. The provision of the Act contemplates that an application has to be made within a specified time and in case no order is communicated to the applicant within 30 days after the receipt of the said application it shall be deemed to have been allowed for the year or the period as the case may be. Thus, the date of the application becomes very important. It can therefore be said that the application contemplated under the Municipal Act is a written application. Section 340 of the Act contemplates that all licenses granted under the Act shall be in writing, though there is no

particular form prescribed for private markets. A general form is provided in Appendix III of Rule 585 of the Orissa Municipal Rules.

Whether the form of the license sufficiently fulfils the requirements in the case of a private market or not is a different matter, but it obviously serves the purpose of granting a license in some form. It is not understood why the Municipality instead of granting a separate license was treating the receipt itself as a license. That no person can run a market without a valid license cannot be disputed, nor can it be contended that the grant of a valid license depend upon the payment of the actual license fee chargeable for the grant of the license. There may be some cases as in the present where a genuine dispute may arise about the actual quantum of license fee that is to be paid. The grant of a license and the payment of licence fee are two different things. It is thus undisputed that no person is authorised to carryon any private market without obtaining a valid license for the same though for some reason or other the payment of actual license fee may be postponed. This is apparent from Section 337 of the Act. Clause (5) of Section 337 provides that the grantee of every license or permission shall, at all reasonable time, while such license or permission remains in force produce the same at the request of the Executive Officer or any person authorised by him. Clause (8) of that section further provides that acceptance by the Municipality of the prepayment of the fee shall not entitle the person making such payment to the license as of right, but he will be entitled only to the refund of the fees in case he is refused the license. Ext. A only shows that the Municipal authorities called upon the accused persons to file an account of their business with a view to fix the license fee for the year 1958-59. This right of the Municipality to assess fees also applies to cases where the business is run even without a license, as otherwise the relevant provisions of the Act would be nugatory. If a person carries on business without a license and is detected at sometime, the Municipal authorities have yet powers to proceed against him for realisation of their legitimate fees. Ext. A therefore cannot go much further to be of any help to the Respondents-accused persons if in fact they had carried on the business for the year in dispute without any license. Section 383 provides the penalty for contravention of any of the provisions specified in the 1st column of Schedule IV, Section 297 forms part of Schedule IV. Thus, if a person continues to carry on private market without a valid license, he becomes liable u/s 383 of the Act. Moreover, Section 303 authorises a Municipality to close any private market in respect of which no license has been applied for and Section 301(2) provides that it shall not be lawful for any person to keep open any private market until the license is renewed. It is, therefore, clear that the accused persons are not authorised to carryon their market even without making an application for renewal of the license and obtaining the same in the manner provided by the law. The main ground on which the order of acquittal is based is that an application was in fact given to the Municipal authorities. But as I have said before there was no such valid application before the Court. The order of acquittal is thus not justified in law and has to be set aside.

8. The next question is as to who of the accused persons would be made liable for the contravention of the provisions of Section 297 of the Act From Ext A it appears that the complainant-Municipality treated the accused Fanindranath Ghosh as the owner in charge of the market. He does not deny that position but contends that the fees could not be paid on account of the dispute regarding the quantum of fees. The civil liability of the parties is however different and the Municipality may proceed to realise the arrear fees from all persons from whom it is due.

In view of the aforesaid position, I set aside the order of acquittal so far as the accused Fanindranath Ghosh is concerned and convict him u/s 383 of the Municipal Act and sentence him to pay a fine of Rs. 100/-. He shall also pay a sum of Rs. 100/- towards the costs of the prosecution as contemplated u/s 337(6) of the Orissa Municipal Act. The order of acquittal in respect of other accused Respondents is however maintained.