

(2006) 02 OHC CK 0040

In the Orissa High Court

Case No : Writ Petition (C) No. 10501 of 2005

Bhimsen Sahu and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 07-02-2006

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 2(8), 29(2), 8, 8(2), 89
Orissa Excise Rules, 1965 — Rule 32, 59, 60

Citation : (2006) 101 CLT 524 : (2006) 1 OLR 357 Supp

Hon'ble Judges : P.K. Mohanty, J;J.P. Mishra, J

Bench : Division Bench

Advocate : M.S. Panda, Prasant Ku. Nanda and J.N. Panda, for the Appellant;
Bijan Ray, Narsingha Patra, A.K. Patra and B.N. Sarangi and Additional
Government Advocate, for the Respondent

Judgement

J.P. Mishra, J.—The petitioners have challenged the process of selection for granting exclusive privilege in favour of Opp. Party Nos. 5 & 6 and have approached the extra-ordinary jurisdiction of this Court for issuing a Writ of mandamus with the direction to other Opp. Parties to select the petitioners as the sole qualified/eligible applicant for the privilege in respect of out-still shops of Gopalpur.

2. The Government of Orissa in Excise Department as per its policy for the year 2005-06 decided to grant exclusive privilege in respect of out-still liquor shops of Gopalpur in the district of Ganjam-Gajapati along with other districts for the remaining period with effect from 1.8.2005 (Annexure-1) under the Bihar and Orissa Excise Act, 1915 (hereinafter referred to as "the Act"). Accordingly, the erstwhile Revenue & Excise Deptt. Notification No. 634-Ex-66/89 EX dated 19.4.1990 published in Issue No. 514 of the Orissa Gazette on 20th April, 1990 was amended vide order No. 2920 dated 28.4.2005 (Annexure-2).. Pursuant to the said amendment, the Collector, Ganjam-Gajapati, invited applications on 13.7.2005 (Annexure-3) for allotment of the shops of Gopalpur and other shops in the district of Ganjam-Gajapati which was to be finalized by drawal of lottery

on 28.7.2005 and the date was deferred to 11.8.2005. As per the amendment, the applicants are to submit solvency certificate to the tune of three times of the consideration money, i.e., Rs. 4 lacs in respect of Gopalpur shops. The petitioners furnished solvency certificate of Rs. 15 lacs for Gopalpur shops. The other four applicants were the competitors, but the application of one group (joint applicants Padmanava Jena and others) stood rejected for pendency of a case against one of them under the Act leaving three sets of joint applicants in the field.

3. It is averred in the Writ Application that excepting the petitioners' group the other two groups did not furnish the required amount of solvency certificate. It is stated that Opp. Party Nos. 5 & 6 submitted solvency certificate of Rs. 10 lacs and the other group (Rabikar Sekhar Deo & others) submitted solvency certificate of Rs. 11.98 lacs as against Rs. 12 lacs. According to the petitioners, since the other two groups of joint applicants did not file the required solvency certificate to the tune of Rs. 12 lacs, their applications should not have been taken into consideration in the lottery for allotting exclusive privilege for the out-still liquor shops of Gopalpur. The petitioners have also averred that because of the inadequate solvency the Opp. Party Nos. 5 & 6 should not have been declared to be the successful applicants and further verification of their criminal antecedents should not have been called for under Annexure-6. The averments of the petitioners regarding loss of revenue by the Government are not worth-mentioning as vires of the notification/order/rule has not been challenged.

4. The Opp. Party Nos. 5 & 7 have filed counter with the averments that grant of exclusive privilege by way of lottery is not amenable to the Writ Jurisdiction as the same is appealable under the Act. According to them, vide Clause-3(xi)(n) under Annexure-3 the petitioners should have approached the Excise Commissioner without approaching the Writ Jurisdiction of this Court.

5. The plea of estoppel has also been taken since the petitioners had taken part and did not raise any objection at the time of drawal of lottery. The specific stand taken by opp. Party Nos. 5 and 6 is that they submitted solvency certificate of Rs. 12 lacs which includes bank guarantee of Rs. 2 lacs duly pledged in favour of the Collector, Ganjam-Gajapati so also the other group (Rabikar Sekhar and others) furnished solvency to the tune of Rs. 12,03,000/- including a bank guarantee of Rs. 5,000/-. The Opp. Party Nos. 5 and 6 have annexed solvency certificate and bank guarantee under Annexures-A/5 and B/5.

6. The state has also filed counter with the same plea that the petitioners' prayer is not amenable to the writ jurisdiction while supporting the solvency certificate to be adequate with the bank guarantee furnished by the other two groups, i.e., Opp. Party Nos. 5 and 6 and Rabikar Sekhar Deo's group and there is no mala fide in the process of selection.

7. According to the Opp. Party Nos. 5 and 6, they have already spent huge amount as per Annexure-C/5 in the meantime after issuance of Annexure-6 and

have prayed to dismiss the writ application. The further stand of Opp. Party Nos. 5 and 6 is that the Collector/Officer conducting auction shall satisfy himself regarding the solvency and can also insist upon bank guarantee as per Clause (vi) (Annexure-E/5).

8. The admitted facts are that the petitioners, Opp. Party Nos. 5 and 6 and other group of Rabikar Sekhar Deo were the competitors in the lottery before the selecting authority-Opp. Party No. 3 in response to the notice dated 13.7.2005 for the out-still liquor shops of Gopalpur. There is also no dispute that the petitioners and the other groups had furnished solvency exceeding Rs. 12 lacs including bank guarantee duly pledged to the concerned bank. Learned counsel for the petitioners, Mr. M.S. Panda, has contended that since the acceptance of bank guarantee in addition to solvency certificate was not provided under Annexure-2, the declaration of Opp. Party Nos. 5 and 6 is tainted with mala fide by the selecting authority. According to him, no appeal lies to the Commissioner against the process of selection and, therefore, the cause of action is very much amenable to writ jurisdiction.

9. In reply, Shri Bijan Ray, Learned Senior Counsel, submitted that since efficacious remedy is available u/s 2(8) of the Bihar and Orissa Excise Act and Rule 60 of the Orissa Excise Rules, 1965 the Writ Petition should be dismissed. Reliance has been placed on the decision of this Court in W.P. (C) No. 12909 of 2003. It is next contended by Shri Ray that bank guarantee carries more weight than that of other solvency for the reason that money can be recovered easily in comparison to other solvency. In this respect, he has also taken us through Annexures-D/5 and E/5 pointing out Clause-VI of the Government Notification/ Order dated 19.4.1990 which suffered from amendment in 1992 authorizing the Collector to insist upon Bank guarantee, if thought expedient and reasonable.

10. The plea of estoppel raised by the Learned Counsel Shri Ray is not tenable at all for the reason that by the time of the draw of lottery for allotment of out-still liquor shops it was not known to the petitioners that Opp. Party Nos. 5 and 6 and the other groups had deposited bank guarantee in addition to the solvency certificates amounting to three times/or more than the consideration money of Rs. 4 lacs for the said shops. Now we are left with the following questions to be answered :

(i) Whether the writ application is maintainable ?

(ii) Whether the bank guarantee can substitute the solvency certificate ?

The relevant portion of the amendment order dated 28.4.2005 is necessary to be mentioned for reference. Sub-clause (i) of Clause (x) stood amended in the aforesaid order. The said clause in the erstwhile notification dated 19.4.1990 (Revenue & Excise Deptt. Notification No. 634/EX/66/89) was totally substituted. Clause-1 of Annexure-2 is quoted below :

The consideration money for exercising the exclusive privilege for retail sale of

country liquor in the District of...will be determined through "inviting applications on fixed consideration money and by draw of lottery" in accordance with the order issued under Sub-section (2) of Section 29 of the Bihar and Orissa Excise Act, 1915, (No. 2 of 1915) (hereinafter called as Act) as for the time being in force and applicable, on...(date), at...(time)....(Place).

Pursuant to the amendment, the Collector, Ganjam-Gajapati, invited applications in Form-A on 13.7.2005 (Annexure-3) for settlement of country liquor shops through lottery for the year 2005-2006 giving rise to the option to the petitioners, Opp. Parties 5 and 6 along with other groups of joint applicants to enter into the fray. In the said Annexure-3, Clause 3(xi)(n) was inserted which was exactly the same as that of Sub-clause (i) of Clause (x) of Annexure-2 which reads as follows :

Clause 3(xi)(n) : The decision of the Excise Commissioner relating to any dispute on account of lottery in the District level shall be final which shall be binding on all the applicants to the lottery.

Sub-section (2) of Section 8 of the Bihar & Orissa Excise Act, 1915 envisages that orders passed under this Act under any rule made hereunder shall be appealable in such cases, to such authorities and under such procedure as may be prescribed by the rules made under Clause (c) of Section 89(2). Section 89 of the Act empowers the State Government to make rules and Section 89(2)(c) which is relevant for our purpose is quoted below :

Section 89(2)(c) ;for declaring in what cases or classes of cases and to what authorities appeal shall lie from orders; whether original or appellate passed under this Act or under any rules made hereunder, and for prescribing the time and manner for presenting and the procedure for dealing with, such appeals.

11. Pursuant to the power flowing from Sub-section (2)(c) of Section 89, the State Government framed the Orissa Excise Rules, 1965 providing for appeals to be filed before the Commissioner from the orders of the Collector. Rule 60 of the said Rules is quoted below :

Rule 60 Appeals to Commissioner from orders of Collector: An appeal shall lie to the Commissioner from any order made by the Collector or the Additional District Magistrate;

Provided that there shall be no appeal against an order increasing or decreasing in the number of licences " under the proviso to Rule 32 of these rules for the sale of foreign liquor.

On a harmonious reading of the aforesaid provisions of the Act and Rules it is quite clear that any order made by the Collector or the Additional District Magistrate can be challenged before the Commissioner.

12. In the present case, it has been specifically mentioned in the notice dated 13.7.2005 that the decision of the Excise Commissioner relating to any dispute

on account of lottery in the district level shall be final and shall be binding on all the applicants to the lottery. This is exactly in consonance with Sub-clause (ii) which was substituted vide Annexure-2. Admittedly, the petitioners have not filed any appeal against the order of the Collector in regard to the lottery in the instant case. In this regard, a Division Bench of this Court had already taken the view in W.P. (C) No. 12909/2003 as relied on by the Learned Counsel Shri Ray. In the said case, the demand notice was under challenge for balance consideration of MGQ for the year 2002-2003. This Court by quoting Rules 59 and 60 of the Orissa Excise Rules, 1965 and referring to Section 89(2)(c) and Section 8 of the Act came to the conclusion that any order/judgment passed by any subordinate officer can be appealed before the Collector. Likewise, any order made by the Collector is appealable to the Commissioner.

13. Therefore, the submission of the learned Counsel Shri Panda that no appeal lies against the order of the Collector cannot be accepted in view of availability of statutory remedy to the petitioners. Hence, the present writ application is not maintainable. Since we have concluded that we are not inclined to entertain the writ application, we do not feel it proper to give finding on the second question since alternative remedies are available in common law forum.

Accordingly, we are not inclined to entertain this writ petition and dispose of the same with the observation that if so advised the petitioners are at liberty to assail the order before the appropriate authority. The Misc. Case stands disposed of accordingly.

P.K. Mohanty, J.

14. I agree.