(2010) 12 OHC CK 0039

In the Orissa High Court

Case No : Writ Petition (C) No. 10448 of 2010

Bimala Parija and Others — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 07-12-2010

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22(1)
Orissa Excise (Exclusive Privilege) Foreign Liquor Rules, 1989 — Rule 3, 3(5)
Orissa Excise Rules, 1965 — Rule 32, 34, 34(1)

Citation : (2011) 111 CLT 387 : (2011) 1 OLR 107

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This writ petition has been filed for quashing Annexure-1 by which the opposite party No. 3-Collector, Khurda has renewed the licence granted in favour of opposite party No. 5-Debendra Sahoo for the year 2010-11 for operation of IMFL OFF Shop at Trinath Bazar, P.S. Balianta under Jagannathpur Grama Panchayat in the district of Khurda, on the ground that the same has been granted in violation of the mandatory provisions laid down in the Excise Laws and against the greater interest of the general public of the locality.

2. Mr. R.K. Rath, learned Senior Advocate appearing for the Petitioners submits that the villagers of Jagannathpur G.P. are peace loving persons and they had protested the opening of IMFL OFF Shop in their locality at Trinath Bazar in the year 2006. The State Government considering the grievance of the villagers decided to shift the IMFL OFF Shop from Trinath Bazar to Pahala near N.H.5 vide Government order No. 121 dated 06.01.2007 (Annexure-2 Series). Thereafter, no licence was granted to any person till March, 2010 for opening of IMFL OFF Shop at Trinath Bazar. The impugned licence granted now to opposite party No. 5 under Annexure-1 to open the IMFL OFF Shop at Trinath Bazar is against public interest and the same has been granted illegally without complying with the

procedure laid down in the Excise Laws. In spite of grant of impugned licence, opposite party No. 5 could not be able to open the shop at Trinath Bazar due to serious protest by the public. Therefore, opposite party No. 5 illegally ran the shop at different places other than Trinath Bazar which was also seriously objected by the local inhabitants. As a result of such protest, the shop was closed down by the Excise Department. Opposite party No. 5 is now contemplating to open the shop at Trinath Bazar on the strength of licence issued under Annexure-1. Trinath Bazar is a busy area as the Engineering Colleges and temples are located within the said locality. Therefore, no IMFL OFF Shop should be opened in such locality. In spite of several representations made by the local people protesting opening of IMFL OFF Shop in that locality, opposite party Nos. 2 and 3 ignoring the statutory provisions, granted licence under Annexure-1. Therefore, the licence granted under Annexure-1 to opposite party No. 5 should be quashed.

3. Learned Government Advocate referring to the counter affidavit dated 04.10.2010 filed on behalf of opposite party Nos. 3 and 4 submits that the Exclusive privilege for retail sale of IMFL OFF Shop at Trinath Bazar was not granted recently. The shop was initially sanctioned during the year 1997-98 and was settled by public auction. Annexure-1 attached to the writ petition is not a licence. It is the renewal endorsement for the year 2010-11. Therefore, the question of violating the mandatory provisions laid down in the Excise Law does not arise. The licence for opening of IMFL OFF Shop was not granted with reference to any particular plot. It was granted with reference to a particular locality free from any objections. The Exclusive privilege holder is responsible to find out a shop site free from objections by the local public in order to run the shop. In the past, since sale of IMFL in Trinath Bazar IMFL OFF Shop was deteriorated, on the request of Ex-E.P. holder Sri Debaraj Jena, Government of Orissa after observing the required formalities have allowed such shifting from Trinath Bazar to Pahal. After shifting the said IMFL OFF Shop during the year 2006-07, it was felt necessary to open the said shop again at Trinath Bazar during the year 2007-08 taking into consideration the feasibility of the said shop. Besides, in response to the office public notice No. 101/Ex dated 14.01.2008 inviting objections for opening of Trinath Bazar IMFL OFF Shop, no objection was received. Since no objection was received, the Government of Orissa in its letter No. 1742/Ex dated 20.03.2008 sanctioned opening of the shop in question at Trinath Bazar. Due to shortage of time to process for settlement of this shop at the fag end of the year 2007-08, the said shop could not be settled during the said financial year 2007-08 and was settled in favour of Smt. Urmila Sahu w.e.f. 17.03.2009 (for the part year 2008-09). Similarly, after following the required formalities like inviting public objection vide Public Notice No. 365/Ex. Dated 20.02.2008, the Exclusive privilege was granted to opposite party No. 5 with effect from 15.03.2010 for opening of IMFL OFF Shop at Trinath Bazar (for the part year 2009-10). Inspite of several attempts, since opposite party No. 5 failed to find out a suitable shop site free from objections, he was unable to open his

shop at Trinath Bazar. He could not open his shop at any other place than the approved locality. The entire revenue village of Trinath Bazar was allowed to the E.P. holder to open his shop and the E.P. holder has to find out a suitable site free from objections of the local public in order to operate his shop. The restricted place like religious and educational institutions as specified in Rule 34 of the Orissa Excise Rules, 1965 are applicable only in case of On shops. However, at the time of opening of an IMFL OFF Shop, the said restricted distances are being taken into consideration for the greater interest of local public.

4. Opposite party No. 3 in his additional affidavit dated 03.11.2010 has submitted the enquiry report showing distance of nearby educational institutions and place of worship from the proposed site for operation of Trinath Bazar IMFL OFF Shop. It is stated that the proposed site is not such as to obtrude itself on the attention of the public or to render passers-by subject to annoyance. The licence has been issued for consumption of liquor ''OFF'' the shop premises and no consumption of liquor is permitted in the shop premises.

5. Opposite party No. 5 in his counter affidavit dated 15.07.2010 has taken a stand that under Rule 3(5) of the Orissa Excise (Exclusive Privilege) Foreign Liquor Rules, 1989 an extract of the public notice shall be sent to the Chairman of Panchayat Samiti or Sarpanch of Grama Panchayat to raise objection. Therefore, the Petitioners cannot have any grievance to the opening of "OFF Shop" at Trinath Bazar when they have not filed any objection for grant of the said licence at Trinath Bazar. It was submitted that the Petitioners have been set up by the nearby licensee to file the present writ petition to oppose the grant of OFF Shop in question in favour of opposite party No. 5 The Petitioners have not raised any objection pursuant to the public notice issued by the opposite party No. 3-Collector for the year 2009-10 as provided in proviso to Section 22(1-a) of Bihar and Orissa Excise Act read with Rule 3 of the Rules, 1989 for grant/renewal of OFF Shop licence at Trinath Bazar in favour of opposite party No. 5. Therefore, the action of the Petitioners is not bona fide. The Collector issued licence in favour of opposite party No. 5 on 15.03.2010 and the operated the shop at Trinath Bazar by lifting monthly MGQ as per the licence condition. As per the Excise Policy formulated by the State Government for the year 2010-11, all the existing IMFL OFF Shops could be renewed for the said year with 10% increase in licence fee. Accordingly, the opposite party No. 5 submitted an application for renewal of his IMFL OFF Shop at Trinath Bazar for the year 2010-11 and deposited three months advance consideration money. The Collector, Khurda, renewed the IMFL OFF Shop at Trinath Bazar in favour of opposite party No. 5 on 06.04.2010 for the year 2010-11 and he was allowed to operate the shop over plot No. 288, Trinath Bazar area, village Anantapur, P.S. Balianta under Jagannathpur G.P. After receipt of the renewal licence under Annexure-1, opposite party No. 5 operated the shop over the said plot at Trinath Bazar for the months of April and May, 2010 and accordingly paid the licence fee and excise duty on MGQ. Against grant of Trinath Bazar OFF Shop licence, one Pradip Kumar

Bhol has earlier filed a writ petition bearing W.P. (C) No. 8037 of 2010 before this Court to quash the licence granted in favour of present opposite party No. 5 vis-a-vis for a direction to close down the shop. This Court vide order dated 03.05.2010, as an interim measure, directed that opposite party No. 5 shall strictly operate the shop in respect of which licence has been granted and should not be permitted to open the shop other than the place at Trinath Bazar, for which licence has been granted. Pursuant to the said order, the Sub-Inspector of Excise all of a sudden on 22.05.2010 closed the shop. Opposite party No. 5 appeared in the case and filed a Misc. Case No. 8741 of 2010 for appropriate order directing opposite party Nos. 3 and 4 to allow him to operate the shop. While the aforesaid writ petition was pending, another set of persons filed the present writ petition with self same prayer relying on common documents. The said writ petition was disposed of on 22.06.2010 with the observation that since the grievance of the Petitioner have been meted out no further order is required to be passed specifically taking into consideration the submission of opposite party No. 5 that he is not operating the shop at Bhimpur. Licence in IMFL OFF Shop has been granted by the State Government for the year 2010-11 after observing the provisions of law to meet the ascertained demand of foreign liquor and to counteract the supply through illicit sources as contemplated under Rule 32 of the Orissa Excise Rules, 1965. Since opposite party No. 5 has been issued with licence of OFF Shop to sell liquor OFF the premises with bottles, the restriction provided under law is not applicable to OFF Shops but is applicable to ON Shops where liquor is consumed in the licensed premises.

6. Mr. A.P. Bose, learned Counsel appearing for the intervenors submits that the intervenors came to learn from the Petitioners that opposite party No. 5-Debendra Sahoo in his counter affidavit filed in the present writ petition has relied upon and also annexed a representation (Annexure-G/5) purportedly signed by the intervenors. The Intervenors verified Annexure-G/5 shown to them by the Petitioners and they found that the said Annexure contains their forged signatures and the entire representation is fabricated by opposite party No. 5. The intervenors have never endorsed their consent for opening of IMFL OFF Shop at Trinath Bazar. The intervenors along with other villagers represented the Local MLA to shift the IMFL OFF Shop to any other place. Opposite party No. 5 in course of hearing strongly opposed the averments made in the intervention petition and submitted that Annexure-G/5 does not contain forged signature and he is prepared to face any enquiry by any competent authority or any proceeding in any competent Court in this regard.

7. The undisputed facts are that in response to public notices inviting objections against opening of Trinath Bazar IMFL OFF Shop vide No. 101/Ex. dated 14.01.2008 and vide No. 365/Ex. Dated 20.02.2008, no objection was filed by the present Petitioners or opposite party Nos. 6 and 7-Intervenors. The Government of Orissa in its letter dated 20.03.2008 sanctioned the shop in question afresh in favour of opposite party No. 5 since no objection was received in response to public notice inviting objection against opening of the OFF Shop in

question. Against the grant of Trinath Bazar IMFL OFF Shop licence in favour of opposite party No. 5, one Pradip Kumar Bhol filed a writ petition bearing W.P.(C) No. 8037 of 2010 before this Court to quash the licence granted in favour of opposite party No. 5 and for a direction to close down the shop. This Court vide order dated 03.05.2010 as an interim measure directed that opposite party No. 5 shall strictly operate the shop in respect of which licence has been granted and should not be permitted to open the shop other than the place at Trinath Bazar for which licenoe has been granted. Opposite party No. 5 appeared in the case and filed a Misc. Case No. 8741 of 2010 for appropriate order directing opposite party Nos. 3 and 4 to allow him to operate the shop. The said writ petition was disposed of on 22.06.2010 with the observation that since the grievance of the Petitioners having been meted out no further order is required to be passed specifically taking into consideration the submission of opposite party No. 5 that he is not operating the shop at Bhimpur. The specific stand of opposite party No. 3 in his additional affidavit dated 03.11.2010 is that the enquiry report showing distance of nearby educational institutions and place of worship from the proposed site for operation of Trinath. Bazar IMFL OFF Shop, is not such as to obtrude itself on the attention of the public or to render passers-by subject to annoyance.

8. Admittedly, the licence under Annexure-1 has been renewed for sale of liquor ''OFF'' the shop premises. Needless to say that no consumption of liquor is permitted in the ''OFF'' shop premises.

At this juncture, it is relevant to note what is contemplated in Rule 34 of the Orissa Excise Rules, 1965. The same is reproduced below:

34. Licences for shops for consumption of liquor on vendor''s premises not to be granted at certain places: [(1) No New Shop shall be licensed for consumption of liquor on the vendor''s premises.-

(a) in a market place, or

(b) at the entrance to a market place, or

(c) in the close proximity to a bathing-ghat, or

(d) within at least 500 meters from a place of worship, recognized educational institution, established habitat especially of persons belonging to Scheduled Castes and labour colony, mills and factories, petrol pumps, railway stations/ yard, bus stands, agricultural farms or other places of public resort, or

(e) within at least one kilometer from industrial, irrigation and other development project areas, or

(f) in the congested portion of a village:

Provided that the restriction on the minimum distance as mentioned under Clauses (d) and (e) may be relaxed by the State Government in special circumstances.]

(2) So far as practicable, an established liquor shop licensed for the consumption of liquor on the premises shall not be allowed to remain on asite which would not under Sub-rule (1) be permissible for the location of new shop.

(3) In areas inhabited by Scheduled Tribes, country spirit shop shall not be licensed to be placed immediately on the side of main road or any other prominent position that is likely to place temptation in their way.

(underlined for emphasis)

9. Perusal of Rule 34 of the Orissa Excise Rules makes it clear that licence for shop for consumption of liquor under the vendor''s premises are not to be granted at certain placed specified in Rule 34. The Phraseology like ''consumption of liquor on vendor''s premises'' conveys that the said rule is applicable in respect of running of ON Shop meaning thereby consumption of liquor on vendor''s premises. This Court in O.J.C. No. 6662 of 1992 (Sarat Kumar Rath v. State of Orissa and Ors.), disposed of on 14.09.1993 held as follows:

As we understand, licence for ''OFF'' shop is meant for purchase from the shop and not for consumption; whereas ''on'' shop permits consumption also. This being the position, we are not satisfied that the nearness to the temple merited closure of the Petitioner''s shop while allowing the ''ON'' shop in the Prachi Hotel.

10. In the instant case, the privilege licence has been granted to opposite party No. 5 for running OFF Shop. No liquor is consumed in the premises of OFF Shop. Therefore, the restriction imposed under Rule 34 of the Orissa Excise Rules, 1965 has no application to the present case.

11. In the result, the writ petition is dismissed.

No order as to costs.

V. Gopala Gowda, C.J.

I agree.

