(2020) 08 OHC CK 0003

In the Orissa High Court

Case No : Writ Pettion No. 12518, 11792, 12001, 12520, 12522, 12523, 12524, 12525, 12526, 12527, 12745, 13090, 13092, 13106, 13107, 14085, 14304, 15426, 15693, 15709, 15907, 15908, 15965, 15972, 16059, 16060, 16061, 16062, 16064, 16070, 16081, 16084, 16087, 16268,

Gopinath Sahu And Ors APPELLANT

Vs

State Of Orissa And Others RESPONDENT

Date of Decision : 03-08-2020

Acts Referred:

Odisha Excise Act, 2008 — Section 90, 94
Odisha Excise Rules, 2017 — Rule 51, 51(1), 51(2), 51(2)(e), 150, 150(1), 150(2), 150(2)(e), 150(2)(f), 150(2)(f)
Certificates Rules, 2017, — Rule 3, 3(1)(iv), 3(3), 3(iv), 4, 4(3), 4(4), 4(1)(iv)

Citation : (2020) 08 OHC CK 0003

Hon'ble Judges : Mohammad Rafiq, CJ;K. R. Mohapatra, J

Bench : Division Bench

Advocate : A. K. Parija, M.S. Sahoo, Amar Kumar Mohanty, K.A.Guru, S.K.Mohapatra , Prasanta Kumar Nayak, A.K.Mohapatra, S.Mishra, S.N.Dash, Arun Kumar Patra, B.Shadangi, Amar Kumar Mohanty, Kousik Ananda Guru, S.K.Mohapatra, Santanu Kumar Sarangi, A.K.Nayak

Final Decision : Allowed

Judgement

Mohammad Rafiq, CJ

1. All these writ petitions are founded on identical facts and raise a common question of law whether the Government of Orissa in its Department of

Excise can insist on furnishing Bank Guarantee, instead of Solvency certificate, for grant or renewal of Excise Licenses in respect of IMFL

â??ONâ?? Shops/IMFL â??OFFâ?? Shops, Beer Parlour ON shops, CL Shops/OS Shops, retail vend of IMFL, country spirit, fermented Tari,

Pachwai and Bhang etc. As agreed upon by learned counsel for the parties, all writ petitions were taken up together for analogous hearing and passing a common judgment and order.

2. Under challenge in all these writ petitions is the letter No.2009 dated 30.03.2020 addressed by the Additional Secretary to Government, Government

of Odisha, Department of Excise to the Excise Commissioner, Odisha conveying that the Revenue & Disaster Management Department as per their

order No.465 dated 02.01.2020 has decided to phase out issue of Solvency certificate by Revenue Authorities for grant or renewal of excise licenses

and therefore insisted on producing for Bank Guarantee in lieu thereof for renewal and issuance of license. Since W.P.(C) No.12518 of 2020 has

been taken up as the leading case, we shall briefly narrate the averments made therein to examine legality of the impugned action of the State

Authorities. The petitioner in this case is a licensee in respect of Sikula IMFL Shop. The license was originally issued to him under the Bihar and

Odisha Excise Act and the rules made thereunder. However, the license in the year 2017 was issued under the Odisha Excise Act 2008 (for short,

â??the 2008 Actâ?). The petitioner has been paying monthly consideration amount along with other statutory dues for issuance of license. Copy of

the license of the year 2019-20 has been produced on record. It is contended that the State Government in the Department of Excise vide order

No.2003 dated 28.03.2020 renewed the different excise licenses for the 1st quarter of the financial year 2020- 21. While the excise licenses are

renewed automatically, the Government made changes in rates and guidelines as applicable. The Government in the aforesaid order mentioned that all

excise Duty and Margin Structure along with Regulatory Guidelines, which are not mentioned specifically in the order, would continue as per the

policy of the year 2019-20. When the petitioner submitted documents along with Solvency certificate for renewal of license as required under Rule 51

read with Rule 150 of the Odisha Excise Rule 2017 (for short, â??the Rules of 2017â?), the Competent Authority refused to receive the same and

required the petitioner to submit the documents along with Bank Guarantee and not the Solvency certificate. It has been contended that the State

Government in its Revenue and Disaster Management Department vide order No.465 dated 02.01.2020 directed to phase out the practice of issuing of

Solvency certificates and instructed all the department not to ask for such certificate for grant of any kind of license, such as license to storage agents, grant or renewal of Excise License, query license, etc. and advised them to insist on producing IT Returns or Bank Guarantee, etc. for issuance of

license. The Excise Department of the Government of Orissa accordingly vide impugned letter dated 30.03.2020 directed the authorities to substitute

Solvency certificate by Bank Guarantee.

3. Learned counsel for the petitioners submitted that the Government of Orissa by the aforesaid letter dated 30.03.2020 cannot supersede or override

the statutory provisions contained in Rule 51 and Rule 150 of the Rules of 2017. Rule 51 inter alia provides that an application for grant of license of

Foreign Liquor or IMFL or Beer â??ONâ? shops shall be submitted in Form XI-B and such application shall be accompanied by the documents

enumerated in sub-rule (2) thereof, in clause (e) of which it is mentioned that attested copy of Solvency certificate indicating the solvency of the

applicant to the extent of three lakhs rupees shall be furnished. Rule 51 being statutory rule, the impugned order dated 30.03.2020, which is an

executive instruction, has to yield to it. Rule 150 of the Rules of 2017 also provides for furnishing Solvency certificate for license of retail vend of

IMFL, country spirit, fermented Tari, pachwai and Bhang. It is contended that the Rules of 2017 have been framed by the State Government in

exercise of powers conferred upon it under Section 90 read with Section 94 of the 2008 Act, which have been published in the Odisha Gazette dated

10.03.2017. It is settled principle of law that a statutory provision of law or the Rules cannot be overridden by the executive instructions and in the

event of conflict, the former will prevail. It is contended that Solvency certificates are issued under Rule-3 of the Odisha Miscellaneous Certificate

Rule 2017 (for short, â??the Certificate Rulesâ?). Rule-4 thereof provides that a person desirous of obtaining Solvency certificate would apply to the

Revenue Officer concerned. Such application should be accompanied by an affidavit sworn in before a Magistrate incorporating the details of

immovable properties, the income and source thereof. The Revenue authority on receipt of the application shall cause an enquiry and scrutinize the

documents furnished by the applicant. After verification, the Sub- Divisional Officer by invoking power under Rule-3 of the Certificate Rules is

competent to grant a Solvency certificate. It is therefore prayed that the writ of mandamus may be issued in the terms as prayed for and the impugned order of the Government of Orissa dated 30.03.2020 be quashed and set aside.

4. Shri Ashok Parija, learned Advocate General appearing for the State opposed the writ petitions and submitted that Government has taken a uniform

decision in respect of all the departments wherever lease/license are issued. Attention of the Court was invited towards order of Government in its

Revenue & Disaster Management Department dated 02.01.2020 to argue that a policy decision has been taken to phase out the practice of issuing the

Solvency certificates as it consumes a significant amount of time of both of the citizens and the Revenue Officers. It is contended that clause-6 of the

aforesaid letter provides that no Department shall now ask for Solvency certificate for, grant of license to storage agents, grant or renewal of excise

license, quarry lease, etc. They would instead ask for IT returns or Bank Guarantee, etc. for issuing such licenses. The concerned Department

including the Excise Department were asked to follow the instructions. It is pursuant to the aforesaid that the Excise Department of the Government

of Orissa has issued the impugned letter dated 30.03.2020.

5. Learned Advocate General, however, when confronted with the statutory prescription made in Rule 51 and Rule 150 of the Rules of 2017 and

asked to explain how the statutory rules can be superseded by the executive instructions, fairly submitted that the Government is in the process of

incorporating the appropriate amendments in the Rules of 2017 to provide for Bank Guarantee in place of Solvency certificate.

6. We have given our thoughtful consideration to rival submissions and examined the material on record.

7. In order to appreciate the issue involved, we deem it appropriate to reproduce hereunder sub-rules (1) and (2)(e) of Rule 51 of the Rules of 2017:-

â??51. Application for grant of license of Foreign Liquor or IMFL or Beer â??ONâ? shop.â?"1() Subject to the provisions of these rules,

an application for Foreign Liquor or IMFL or Beer â??ONâ? shops shall be submitted in Form XI-B only by those who are having hotels or

restaurants.

(2) The application shall be accompanied with the following documents, namely:-

xxx xxx xxx

(e) attested Copy of Solvency Certificate indicating the solvency of the applicant to the extent of Three lakhs rupees;

xxx.â??

Since sub-rules 1 and 2 (e) & (f) of Rule 150 of the Rules of 2017 would also be relevant for the purpose of deciding the case, they are reproduced

hereunder:-

â??150. Manner of fixation and realization of fees.â?

(1) The fees for licences for the retail vend of IMFL, country spirit, fermented Tari, pachwai and Bhang shall be such as fixed by auction, or e-

auction, tender, e-tender or otherwise subject to reserve price determined in each case by the State Government.

(2) Where the retail sale of intoxicant is made through e-auction the following conditions shall be fulfilled by the bidder along with other terms and

conditions to be notified by State Government, from time to time, namely :â?

xxx xxx xxx

(e) the bidder from inside the State shall furnish solvency certificate equivalent to six times of the monthly reserve price in respect of immovable

property or Bank Guarantee;

(f) the bidders from outside the State shall furnish Bank Guarantee equivalent to six times of the monthly reserve price done with local suretyâ??

Rule 3(1)(iv), 3(3), 4(1)(iv) and 4(3) of the Certificates Rules 2017, being relevant for deciding the present batch of writ petitions, are also reproduced

hereunder:-

â??3. Categories of miscellaneous certificates:- (1) Subject to the provisions hereinafter contained, a Revenue Officer shall be competent to

grant following categories of miscellaneous certificates, namely:-

(i) xxx

(ii) xxx

(iii) xxx

(iv) Solvency certificate (Form No.IV)

(v) xxx

(v-1) xxx

(vi) xxx

(2) xxx

(3) The solvency certificate for an amount exceeding five lakh rupees shall be granted by the Tahasildar and Additional Tahasildar subject to the

approval of Sub-Collector.

4.(1) Application for miscellaneous certificates:- A person desirous of obtaining a certificate shall file before a Revenue Officer an application,-

(i) xxx

(ii) xxx

(iii) xxx

(iv) for issuance of Solvency certificate, in Form No.4;

(v) xxx

(vi) xxx

(2) xxx

(3) An application for solvency certificate shall be accompanied by the list of immovable properties along with the encumbrance certificate.â??

8. Sub-rule 1 of Rule 51 of the Rules of 2017 inter alia provides that subject to the provisions of these rules, an application for Foreign Liquor or IMFL

or Beer â??ONâ? shops shall be submitted in Form XI-B. Form XI-B is captioned as â??APPLICATION FORM FOR GRANT OF LICENSE

FOR RETAIL VEND OF IMFL/BEER FOR CONSUMPTION IN VENDORâ??S PREMISES FOR THE YEAR 20â?. Clause-10 of the said

application in Form XI-B requires the applicant to answer â??whether Solvency is the extent of Rs.3.00 (Three lakhs) and that copy of the Solvency

certificate to be enclosedâ?. Rule 51 (2) provides that the application shall be accompanied with the documents mentioned in various clauses thereof.

Clause (e) of sub-rule (2) of Rule 51 of the Rules of 2017 mentions attested copy of Solvency certificate indicating the solvency of the applicant to the

extent of three lakhs rupees as one of the requisite documents. Rule 150 of the Rules of 2017 provides that the fees for licenses for the retail vend of

IMFL, country spirit, fermented Tari, pachwai and Bhang shall be such as fixed by auction, or e-auction, tender, e-tender or otherwise subject to

reserve price determined in each case by the State Government. Sub-rule 2 of Rule 150 of the Rules of 2017 provides that where the retail sale of

intoxicant is made through e-auction, the conditions enumerated therein shall be fulfilled by the bidder along with other terms and conditions to be notified by State Government, from time to time. Clause (e) of Rule 150 of the Rules of 2017 provides that the bidder from inside the State shall

furnish Solvency certificate equivalent to six times of the monthly reserve price in respect of immovable property or the Bank Guarantee. Clause (f) of

sub-rule 2 of Rule 150 supra however does not give that option to the bidders from outside the State and requires them that they shall furnish Bank

Guarantee equivalent to six times of the monthly reserve price along with local surety.

9. Comparison of clause(e) with clause (f) of sub-rule 2 of Rule 150 of the Rules of 2017 makes it abundantly clear that State has the policy of giving

the facility to bidders from inside the State to furnish either the solvency certificate equivalent to six times of the monthly reserve price in respect of

immovable property or the Bank Guarantee. This apparently leaves it at the option of the bidders to choose from either of the two, but no such facility

has been given to the bidders from outside the State, who are required to necessarily submit the Bank Guarantee equivalent to six times of the monthly

reserve price along with local surety. While Rule 51 does not at all mention about the requirement of Bank Guarantee but Rule 150(2)(f) has

mentioned about the necessity for the bidders from outside the State to furnish Bank Guarantee equivalent to six times of the monthly reserve price

done with local surety.

10. Let us now examine the matter from the perspective of the Certificate Rules. Rule-3(iv) and Rule 3(3) thereof provide for issuance of Solvency

certificate. Rule-4(1)(iv) of the Certificate Rules provides that a person desirous of obtaining a Solvency certificate would apply to the Revenue

Officer concerned on application in Form No.IV. Rule 4(3) of these Rules provides that application should be accompanied by an affidavit sworn in

before a Magistrate, incorporating the details of immovable properties, the income and source thereof. On receipt of such application, the Revenue

Officer shall cause an enquiry and scrutinize the documents furnished by the applicant. After the process of verification is complete, the Revenue

Officer concerned by invoking power under Rule-3 (iv) of the Certificate Rules shall issue solvency certificate on Form No.IV.

11. In view of the above discussed position of law, it must be held that the statutory prescription enumerated in the statutory Rules namely; Rule 51

and Rule 150 of the Rules of 2017 and Rule 3 and Rule 4 of the Certificate Rules, cannot be overridden by mere executive order issued by the

Revenue & Disaster Management Department dated 02.01.2020. As a logical corollary thereto, the impugned order issued by the Excise Department

dated 30.03.2020, being ultra vires of the Rules aforementioned, is wholly incompetent. Even if the Government were to suitably amend the Rules

now, in so far as the present batch of petitions is concerned, such amendment cannot completely omit the provision of producing the Solvency

certificate and require the production of the Bank Guarantee. Even if such provision is brought in the Rules by way of amendment, it shall obviously be

applicable only prospectively and not retrospectively.

12. We may in this connection usefully refer to the judgment of the Supreme Court in State of Orissa & ors. Vs. Prasana Kumar Sahoo, reported in

(2007) 15 SCC 129. Their Lordships of the Supreme Court, while dealing with a similar situation of conflict between executive instructions and

statutory rules, in para-12 of the report, held as under:-

â??12. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to

the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of the Constitution of India. A

purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional

provisions.â??

13. In view of the foregoing discussion, all the writ petitions deserve to succeed and are accordingly allowed. The impugned order dated 30.03.2020 is

quashed and set aside. Interim orders passed in all the writ petitions except W.P.(C) Nos.16585, 16748, 16798, 16815, 17599, 17614, 17691, 17635,

17680, 17681, 17696, 17697, 17780 & 17789 of 2020, directing the authorities to renew the licenses of the petitioners on production of the Solvency

certificate, subject to fulfillment of other conditions are made absolute. Such order shall also obtain in all other writ petitions.

14. In the light of the view that we have taken of the matter, the State Government and its authorities are directed to renew the licenses of the

petitioners on production of the Solvency certificate, subject to fulfillment of other conditions.

There shall be no order as to costs.

