(2008) 04 OHC CK 0029

In the Orissa High Court

Manoj Kumar Sahu APPELLANT

Vs

State of Orissa and Another RESPONDENT

Date of Decision : 29-04-2008

Acts Referred:

Citation : (2008) 2 OLR 256

Hon'ble Judges : S.R. Singharavelu, J;I.M. Quddusi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

I.M. Quddusi, J.—By means of this writ petition, the petitioner has prayed for quashing the selection of opposite party No. 5 for grant of exclusive privilege in respect of the IMFL Off shop at New Bus Stand, Berhampur and for issuance of a writ of mandamus commanding the opposite party No. 3 to reject the application made by opposite party No. 5 in respect of the aforesaid Off shop and to declare him as the lottery winner being the remaining qualified and sole applicant for the said shop.

2. The facts leading to the filing of this writ petition are that by notice dated 5.7.2007, the Collector, Ganjam invited applications for the grant of exclusive privilege for retail sale of India Made Foreign Liquor (OFF) shops in respect of six shops as contained m the list enclosed to the notice in the district of Ganjam which included the IMFL OFF shop at New Bus-stand, Berhampur for the period from the date of grant till 31.3.2008 with which we are concerned in this writ petition. The last date of submission of applications was fixed to 18.7.2007 and the date of lottery was fixed as 25.7.2007. Persons interested to apply for the grant had to make the application in Form-B along with the documents mentioned in Clause (xi) of the notice. Pursuant to the notice, the petitioner as well as opposite party No. 5 filed their applications. It is alleged by the petitioner that since opposite party No. 5 had not submitted the sales tax clearance certificate, non-assessment certificate and the affidavit as required by the notice alongwith his application, his application ought to have been rejected and he

could not have been allowed to take part in the lottery and the petitioner being the only valid applicant, he should have been declared as the winner of the lottery. However, vide letters dated 23.11.2007 and 12.2.2008, the Collector granted opportunity to the opposite party No. 5 to submit the sales tax clearance certificate and vide office order dated 29.2.2008 (Annexure-3) it was notified that the applications of the petitioner and opposite party No. 5 were found suitable for consideration for settlement of the said shop through lottery process subject to production of valid documents as per their undertaking submitted in response to letter No. 336/Ex. Dated 12.2.2008. The petitioner has challenged such action of the Collector as illegal, arbitrary and without authority and that the declaration of opposite party No. 5 as lottery winner was in violation of Rule 45 of the Orissa Excise Rules, 1965.

3. Though no counter affidavit has been filed on behalf of opposite party Nos. 1 to 4, Shri P.P. Panda, learned Additional Standing Counsel, has produced the relevant file along with the instruction received from the Superintendent of Excise, Ganjam, Chatrapur opposite party No. 4. Opposite party No. 4 has stated in the instruction that both the petitioner as well as opposite party No. 5 failed to furnish up-to-date sales tax clearance certificate at the time of submission of the application form but the Collector permitted them to participate in the lottery subject to condition that they shall produce up-to-date sales tax clearance certificate in the event of settlement of the shop. Prior to the lottery, the Collector had also issued notice vide letter No. 336 dated 12.2.2008 asking the petitioner as well as opposite party No. 5 to furnish undertaking in shape of an affidavit showing their readiness to furnish the necessary documents on the very date of drawal of lottery in connection with settlement of IMFL OFF shop by 15.2.2008. In the meantime, the date of lottery was postponed to 10.3.2008. On that day in spite of opportunity being given to the petitioner and opposite party No. 5, they failed to produce the required documents but even then the lottery was held and opposite party No. 5 was declared as the winner and was asked to produce the wanting documents within 7 days from the date of drawal of lottery and both petitioner as well as opposite party No. 5 signed the proceedings declaring that the lottery was held in a fair and transparent way and they have no objection to the lottery.

4. We have perused the records produced by the learned Additional Standing Counsel which contains the application of the petitioner as well as opposite party No. 5 and the result of scrutiny of the applications. It appears that the petitioner had filed the solvency, Xerox copy of PAN Card, no dues certificate issued by the Excise authority, two affidavits and two bank drafts along with his application whereas opposite party No. 5 has filed the solvency certificate, no due certificate and three affidavits along with his application. He had not filed the Xerox copy of the PAN Card.

5. In the notice inviting applications for settlement of IMFL OFF shop in question which was in Form ''A'' so many conditions were laid down but for the purpose of

this case the relevant conditions are as under:

3(ix) No licence shall be granted to any person who is of doubtful solvency or who is known to be involved in spurious liquor trade or who has been facing a trial in any Criminal Court under the Act or who has been charged of a non-bailable offence under the provisions of the Indian Penal Code, 1860 (Act XLV of 1860) or who is a defaulter in terms of Rule 45 of the Orissa Excise Rules, 1965 or in terms of Rule 102(A) of the Board''s Excise Rules, 1965.

(xi) The lottery shall be held subject to the following conditions:

(a) ...

(b) ...

(c) ...

(d) An affidavit duly executed by the applicant before an Executive Magistrate to the effect that the applicant has not been convicted in any criminal, case being tried in any Court of competent jurisdiction shall also be enclosed to the application

6. The petitioner, Manoj Kumar Sahu had submitted two affidavits, one dated 22.3.2007 and the other dated 18.7.2007 along with his application. In the first affidavit dated 22.3.2007 he has mentioned that "there is no sales tax case pending against me and I am not due to pay any sales tax before the sales tax authority in any manner. In the second affidavit dated 18.7.2007, he had, inter alia, stated as under:

2. That I have not involved in spurious liquor trade or facing a trial in any Criminal Court under the Act or charged of a non-bailable offence under the provisions of the Indian Penal Code, 1860 (Act XLV of 1860). So also I have not been convicted in any criminal case or being tried in any Court of competent jurisdiction.

3. That I am also not defaulter under Rule 45 and 102(A) of Board''s Executive Rules, 1965.

Opposite party No. 5 had filed three affidavits along with his application in Form B. All the affidavits were dated 18.7.2007. In the first affidavit, he had stated that he is not a sales tax assessee under VAT and CST and that there is no sales tax case pending against him and he is not due to pay any sales tax before the Sales Tax Authority in any manner. In the second affidavit, he had mentioned in paras 2 and 4 as under:

2. That there is no civil and criminal case or cases pending against me in any Court of law inside of India and there is also no essential commodities case or cases pending against me in anywhere.

4. That I have obtained the formalities as required for doing the said liquor business as per the Excise law and I am non-defaulter under Rule 45 and 102(A)

of Board''s Excise Rules, 1965.

Instead of filing the Xerox copy of the PAN Card, he had filed the third affidavit stating that he is in an Income Tax assessee and his PAN Card number is KSNS AOJPS8058K and that there is no Income Tax pending against him and he is not due to pay any income tax before the income tax authority in any manner.

7. From the result of scrutiny of the application received from the petitioner as well as opposite party No. 5, it appears that though the petitioner had filed the affidavit as required under Clause 3(ix) and (xi)(d) of the notice inviting applications, as quoted above, that he was not a convicted person in any criminal case, opposite party No. 5 had not mentioned in any of his affidavits that he has not been convicted in any criminal case being tried in any Court of competent jurisdiction. In the result of scrutiny against column No. 11 whether the applicant is eligible to go for lottery whereas in respect of the petitioner the answer is ''yes'', in respect of opposite party No. 5 the answer is in the negative. Rule 45 of the Orissa Excise Rules, 1965 provides that licences for the retail sale of intoxicant shall not ordinarily be granted to a person who has been convicted by a Criminal Court of a non-bailable offence. In this context, the affidavit as required under Clause 3(xi)(d) of the notice in Form A assumes importance. Therefore, in any case, opposite party No. 5 having not mentioned the essential requirement whether he is convicted or not by any Court of law, he should not have been allowed to take part in the lottery and the licence could not have been granted in his favour. We are not considering the procedure of drawing of lottery as it has not been disputed by any of the parties; rather both of them have given in writing that the lottery was drawn properly.

8. In the result, we allow the writ petition, quash the result of the lottery held on 10.3.2008 and the exclusive privilege granted to opposite party No. 5 pursuant to such lottery. There would be no order as to costs.

S.R. Singharavelu, J.

9. I agree.