

(2020) 01 CAL CK 0248
In the Calcutta High Court
Case No : Writ Petitions. No. 491 (W) Of 2020

Mohit Lal Ghosh

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 28-01-2020

Acts Referred:

West Bengal Excise (Selection Of New Sites And Grant Of License For Retail Sale Of Liquor And Certain Other Intoxicants) Rules, 2003 — Rule 4(f), 4(g), 4(i), 4(j), 4(k), 4(l), 4(m), 8, 9, 9(1)F, 11, 12
Bengal Excise Act, 1909 — Section 8, 26, 26(1), 26(2), 85

Citation : (2020) 01 CAL CK 0248

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Joydip Kar, Abhishek Halder, Arkaprava Sen, Abhrotosh Majumder, Raja Saha, Debasish Ghose, Abhra Majumder, Debabrata Saha Roy, Subhankar Das

Final Decision : Allowed

Judgement

Sabyasachi Bhattacharyya, J

1. The petitioner has preferred the present challenge against Order No. 673/SED/ E dated December 10, 2019 passed by the Additional District Magistrate (D) and Collector of Excise, Hooghly, directing temporary closure of the petitioner's 'Rikta Restaurant cum Bar' , "for the time being" under Section 26(1), Bengal Excise Act, 1909 (hereinafter referred to as "the Bengal Excise Act"). Such order is annexed at page 64 of the present writ petition.

2. Learned senior counsel for the petitioner argues that the petitioner was granted a temporary license to run the restaurant?cum?bar within the purview of Rule 4, Clauses (i), (j) and (k) of The West Bengal Excise (Selection of New Sites and Grant of License for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003 (hereinafter referred to as "the 2003 Rules"). The said clauses permitted sale of foreign liquor for consumption "on" the premises of any

restaurant and attached bar, hotel?cum?restaurant?cum?bar and hotel?cum?bar. Rule 9 of the 2003 Rules governs the procedure for selection of new site for grant of licenses. Rule 9 reads as follows:

"9. Procedure for selection of new site for grant of licenses ? (1) Subject to such instructions as may be issued by the State Government or Excise Commissioner from time to time, if the Collector is of the opinion, having regard to the general trend of consumption of liquor and other intoxicants as specified in sub?rule (1) of rule 2, in a local area or its adjoining area, that it is necessary to grant license(s) of any number and any category referred to in clauses (a) and (c) to (m) of rule 4 at certain new sites within a local area in order to meet the demand of such area or adjoining areas, he shall, for the purpose of selection of new sites by the State Government under section 30, prepare a preliminary list of such local areas within which, in his opinion, license of any category should be granted.

Provided that in preparing a preliminary list, the Collector shall not include therein the sites for the grant of the licenses of the categories specified in clauses (f) to (m) of rule 4 unless a person or company, or firm, the owner of a hotel, restaurant, club, sites, theatre or other places of public resort and entertainment who is eligible under the provisions of these rules, or any person duly authorized by him, makes an application in Form I or Form II (appended to these rules) as the case may be, with the requisite court?fee:

Provided further that at the time of processing the proposal for grant of the categories of licenses mentioned in clauses (f), (g), (l), (m) of Rule 4, the Collector may process the proposal before completion of the proposed site according to the blue?print plan, but before issuing license, after obtaining approval of Government for selection of site, the Collector shall ask the applicant to acquire the premises of complete the construction within thirty days of receipt of the communication and only after acquisition or completion within the stipulated time, as the case may be, the Collector shall issue the license.

Provided further that, all applications submitted for the grant of licenses of the categories specified in clauses (h), (i), (j) and (k), of rule 4, shall initially be treated as applications for the grant of license(s) temporarily for a period not exceeding six months and the Collector may process the proposals, only if the proposed site is completed, accordingly to the blue?print plan.

The collector shall also go through the following steps, for disposal of the proposal for grant of such licence:?

A. He shall ensure whether the following information and documents have been furnished by the applicant, along with the application:?

(a) A copy of treasury challan, showing deposit of non?refundable application money as fixed under the prevailing rules.

(b) An estimated monthly sale of Foreign Liquor from the proposed licensed premises.

B. After obtaining the application, with the information and documents mentioned above, the Collector shall cause enquiry of the same by a responsible officer, to ascertain:?

(i) The demand of the local area.

(ii) Whether the area is free from objections as contemplated in Rule 8 of the West Bengal Excise (Selection of New Sites and Grant of Licence for Retail Sale of Liquor and Certain Other Intoxicants) Rules, 2003, published vide Notification No. 800?EX., dated 29.07.2003, as amended.

(iii) Whether the applicant(s) is/are eligible to hold the licence according to Rules 11 and 12 of the Rules published under Notification No. 800?EX., dated 29.07.2003 as amended.

C. The following steps shall thereafter be followed by the Collector:?

(a) He shall consider, public grievance, if any, that may be submitted to him in this regard.

(b) In case of receipt of such public grievance, he shall cause enquiry of the same. If on such enquiry, the representation(s) are found to be genuine, he shall not consider the prayer for grant of such licence at the proposed site.

(c) To form an opinion, he may conduct any other enquiries as he feels necessary.

D. After being satisfied that the proposed site is free from any restriction/objection and the proposed licensee(s) is/are eligible to hold an excise licence, the Collector shall grant a licence temporarily for a period not exceeding six months to the said applicant(s).

E. During the period of running such licence, the holder(s) shall be required to pay fees, as may be fixed from time to time.

F. Grant of a regular licence may be considered:

(a) after the holder of such temporary licence has run the same for a period not exceeding six months,

(b) after the Collector is satisfied that the revealed demand justifies the location for the grant of a regular licence, and

(c) subject to the Collector's satisfaction that the application merits recommendation. The Collector may in such cases recommend the proposal for grant of a regular licence and send the same to the Excise Commissioner, who may send it to the Government with his opinion if any. If the Government approves the grant of the regular licence, the same shall be conveyed by the Excise Commissioner, to the Collector. After receiving the approval of the government, the Collector shall grant the regular licence, after realization of fess applicable to new licence(s) of the same category of the same local area.

Explanation: For the purpose of this rule, the word "revealed demand" shall mean the average monthly sale of foreign liquor, during the previous six months, when the licence was allowed to run on a temporary basis.

G. If the Collector recommends and sends the proposal to the Excise Commissioner for the grant of a regular licence for the remaining period of the settlement year or the next period of settlement, he shall issue further temporary licences for periods not exceeding six months in favour of the holder. Such fresh licenses, granted on a temporary basis not exceeding six months, shall be continued to be granted till receipt of an order of approval or rejection from the Government, duly conveyed by the Excise Commissioner. Fee, as mentioned at 'E' above, shall be realized by the Collector for such further grant of licence on a temporary basis not exceeding six months.

(2) In arriving at an opinion referred to in sub-rule (1), the Collector may hold such enquiry as he deems fit, subject to any direction in this regard which may be issued by the State Government or the Excise Commissioner from time to time.

(3) The Collector shall forthwith send the list referred to in sub-rule (1) along with his opinion to the Excise Commissioner.

(4) The Excise Commissioner shall thereafter forward to the State Government the list, the records and the documents sent to him under sub-rule (3), as the case may be, along with his own opinion to the State Government.

(5) The State Government shall finally consider the preliminary list and the documents with the opinions forwarded to it under sub-rule (4), and if it is so satisfied that it is necessary to grant licenses in the local area in order to meet the demand for liquor or any other intoxicant, it may select local areas for categories and number of licenses referred in clauses (a) and (c) to (e) of rule 4 and sites for categories of licenses referred in clauses (f) to (m) of rule 4 for grant of licenses and communicate the same to the Excise Commissioner:

Provided that before selecting any local area for grant of licenses of the categories referred in rule 4, the State Government may, if it considers it necessary, obtain the views of the Commissioner of the Division under whose jurisdiction the local area falls.

(6) Omitted by Notification No. 455?EX., dated 6.3.2006 (w.e.f. 13.3.2006). Note - Omitted by Notification No. 455?EX., dated 6.3.2006 (w.e.f. 13.3.2006)."

3. Section 26 of the Bengal Excise Act is set out below:

"26. Power to close shops temporarily. - (1) The District Magistrate or a Sub-divisional Magistrate, or in Kolkata the Chief Metropolitan Magistrate or the Commissioner of Police, may, by notice in writing to the licensee require that any shop in which any intoxicant is sold shall be closed at such times or for such period as such Magistrate or Commissioner of Police may think necessary for the

preservation of the public peace.

(2) If any riot or unlawful assembly is apprehended or occurs in the vicinity of any shop in which any intoxicant is sold, any Magistrate or any Police Officer above the rank of constable, who is present, may require such shop to be kept closed for such period as he may think necessary.

(3) When any Magistrate or Police Officer makes a direction under sub?section (1) or sub?section (2), he shall forthwith inform the Collector of his action and his reason thereof."

4. Learned senior counsel for the petitioner submits that Section 26(1) envisages that the authorities specified therein may, by notice in writing to the licensee, require that any shop in which any intoxicant is sold shall be closed at such times or for such period as the authority thinks necessary.

5. It is thus argued that the time or period for which the shop should be closed is to be mandatorily disclosed in the order as contemplated in Section 26(1).

6. It is further argued that, both sub?sections (1) and (2) of Section 26 contemplate the criteria for such closure. Whereas sub?section (1) stipulates preservation of the public peace as a reason, sub?section (2) stipulates the apprehension or occurrence of any riot or unlawful assembly in the vicinity of the shop which is to be closed.

7. In the present case, as disclosed from the impugned order at page 64 of the writ petition, the closure was effected merely on the basis of a "mass petition" from local residents, which was deemed to be a "public objection" duly endorsed and forwarded by a local Member of the Legislative Assembly (MLA).

8. It was further ordered that the petitioner's shop would be closed "for the time being", describing the same to be a "temporary closure".

9. It is argued that, the stage of entertaining "public objections" or grievances was contemplated prior to grant of temporary license, as envisaged in Clause C of Rule 9 of the 2003 Rules. The said clause provided for the Collector to consider such public grievance and also permitted the Collector to conduct enquiry to form an opinion on such public grievance.

10. Clause D of Rule 9 provides that, after being satisfied that the proposed site is free from any restriction/objection and the proposed licensees are eligible to hold an excise license, the Collector shall grant a license temporarily for a period not exceeding six months to the said applicants.

11. Hence, it is argued that once such satisfaction was recorded and temporary license was granted, there was no scope for any further review on the ground of insufficient documents having been provided or even any public objection being taken. Section 26 of the Bengal Excise Act envisages closure of a shop on a much higher footing than mere "public objection". None of the criteria stipulated in sub?sections (1) and (2) of Section 26 are satisfied in the present case. There was

neither any necessity for preservation of public peace, nor was there any unlawful assembly or riot or any cause for apprehension of the same.

12. It is submitted that the "mass petition" was made only by eleven (11) people, who were the henchmen of the MLA who endorsed and forwarded such mass petition. Relying on paragraph no.7 of the writ petition, learned senior counsel for the petitioner argues that the said MLA, being respondent no.5 in the writ petition, had approached and threatened the petitioner to close down the petitioner's business. It has been stated further in the said paragraph that even the finalization of the procedure for grant of trade license was being stalled at the behest of the said MLA.

13. The other ground taken by the petitioner in the writ petition is of discrimination, since paragraph no.7 of the writ petition gives a list of at least nine bar?cum?restaurants running within a radius of 1?2 kms of the petitioner's shop. In the event of any public objection, it should have covered those shops as well and the stoppage of the business of the petitioner only was a patently arbitrary and discriminatory exercise of jurisdiction, which can be termed as colourable.

14. In any event, it is argued, at the time of granting regular license under Rule 9(1)F of the 2003 Rules, further objections can be taken into consideration.

15. It is further argued that, against the order of the Collector, an aggrieved person could even prefer a challenge under Rule 3(a) of the Consolidated Rules under Section 85 of the Bengal Excise Act, as well as approach the Excise Commissioner/State Government for control under Section 8 of the said Act itself.

16. By placing reliance on a judgment reported at (2014) 2 CHN 502 [Asutosh Ghosh vs. State of West Bengal & Others], learned senior counsel for the petitioner argues that any aggrieved person can prefer such an appeal and that there is no power of review of a temporary license, once granted.

17. Learned counsel for the respondent no. 5 submits that the allegations of undue influence are incorrect. It is further submitted that, when initially the shop of the petitioner was closed and a news item was published incriminating the respondent no.5 for being responsible for such closure, there was a mass protest before the petitioner's shop in support of respondent no.5 (the MLA) which comprised of at least a mob of five hundred (500) people. This itself, it is submitted, shows that the sentiment of the local people is against the bar?cum?restaurant run by the petitioner.

18. It is further submitted, by placing reliance on paragraph no.4 of the writ petition, read with item 12 at page 54 thereof, that the petitioner does not have a trade license till date, since the petitioner's application in that regard is still pending. No such license was submitted along with necessary documents at the time of grant of temporary license.

19. The State?respondent argues that, apart from no trade license having been

issued to the petitioner till date, the impugned order was not a 'review', since enquiry is still going on regarding the public objection to the running of the shop by the petitioner and the issue is not closed.

20. It is further submitted that the power under Section 26(1), which was exercised in the present case, is not about suspension/cancellation of license but only closure of the shop.

21. Learned counsel for the State cites a division bench judgment of this court reported at (2011) 5 CHN 306 [Mr. Arindam Jha vs. The State of West Bengal & Ors.], wherein it was held, inter alia, that a dissent in the locality is a relevant consideration for the grant of a liquor license.

22. Upon hearing all sides and going through the relevant provisions, the primary ingredient in the impugned order which stares at the face is the indefinite closure of the petitioner's shop in the garb of 'temporary' closure. Section 26(1) of the Bengal Excise Act provides that a shop may be required to be closed "at such times or for such period" as the authority may think necessary. Hence, it is implicit in the section that the time or period for such closure has to be intimated to the license holder. There is no bar in re-imposing such closure after its stipulated period expires, but for each of such re-imposition as well, a specific time limit/period has to be mentioned for such closure. Such element is entirely absent from the order impugned herein.

23. The other patent illegality in the impugned order is that, in the present case, apparently a "mass petition", which was admittedly made by only eleven people, as it came out from the submissions of all parties, was cited as a "public objection".

24. In the absence of any proof or allegation that public peace was being threatened and the preservation of the same was necessary, or for that matter, that there was apprehension or occurrence of any riot or unlawful assembly in the vicinity of the shop, the District Magistrate could not exercise her/his power under Section 26 of the Bengal Excise Act, since those are pre-requisites of such exercise of power.

25. The argument of the petitioner, that already the question of addressing public grievances was taken into consideration while granting the temporary license itself, as contemplated in Rule 9 of the 2003 Rules, is also acceptable. That apart, the documents which are necessary are also specified therein and are to be submitted to the satisfaction of the Collector before such a license is granted. Hence, the chapter of addressing public grievance is closed at the juncture when the temporary license is issued. There is no scope of review of such decision either by the Collector or the District Magistrate or any other authority. Only an appeal could lie against the grant of license itself, under Rule 3(a) of the Consolidated Rules framed under Section 85 of the Bengal Excise Act and a control could be sought at best under Section 8 of the said Act.

26. However, a pre-condition for the exercise of the power under Section 26 of the Act was that there had to be a threat to the public peace or a riot or unlawful assembly, either apprehended or occurred, prior to the closure of the shop.

27. In the present case, only a petition made by eleven persons and endorsed by the respondent no.5, the local MLA, was taken to be the basis of a public objection, sufficient in the eye of the District Magistrate to close the shop temporarily.

28. First, such a mass petition of eleven people could not, following the thought-process of a man of normal prudence, be perceived as a "public objection".

29. Second, a "public objection" could not be a ground under Section 26 of the Bengal Excise Act to close a shop.

30. Third, no time-limit was fixed for such closure in the impugned order, contrary to the spirit of Section 26 itself.

31. Fourth, it appears from the attending circumstances that there was political influence exerted in the impugned order being passed. The reason for holding so, is that the mass petition was not only forwarded by the MLA, being respondent no.5 herein, but, in follow-up action in support of the MLA, against a newspaper article holding the MLA responsible for the closure of the shop, there was a huge mob gathering in front of the petitioner's shop.

32. Such mob violence, in support of the MLA, itself is a sufficient indicator as to what mobilized the Additional District Magistrate in passing the impugned order dated December 10, 2019. The endorsement of the MLA is not as sacrosanct as made out to be in the impugned order and does not have any extra weightage in the eye of law. Moreover, the mob gathering took place only after closure of the shop, that too, not as much against the running of the business but against the name of the MLA being published in the newspaper. Such mob wrath was the result of the action of the respondent no.5, which conclusion does not require much brain-racking.

33. From a different perspective, the post facto mob gathering itself, that too not against the running of the restaurant cum bar but against publication of the MLA's name in a newspaper related to the closure, could not be a ground for closure of the shop.

34. Hence, the impugned decision was not only de hors the law and without jurisdiction, but also palpably arbitrary and a colourable exercise of jurisdiction.

35. In such view of the matter, the impugned order is required to be struck down immediately.

36. Accordingly, W.P. No.491(W) of 2020 is allowed on contest, thereby setting aside the order of temporary closure of the petitioner's restaurant-cum-bar, by the name of 'Rikta Restaurant cum Bar', vide the impugned Order No. 673/SED/E dated December 10, 2019 passed by the Additional District Magistrate (D) and

Collector of Excise, Hooghly.

37. The petitioner shall be entitled to run the said bar?cum?restaurant upon opening the shop with immediate effect. The petitioner is given the liberty to approach the local police for assistance in opening the shop, if necessary, and the local police as well as all the present respondents shall assist fully in such opening of the said bar?cum?restaurant by the petitioner with immediate effect.

38. There will be no order as to costs.

39. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.