

(2005) 11 OHC CK 0029
In the Orissa High Court
Case No : Writ Petition (C) No. 10360 of 2005

P. Ramesh Rao and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 09-11-2005

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22, 22(1), 26A
Orissa Excise Exclusive Privileges Rules, 1970 — Rule 3

Citation : (2005) 11 OHC CK 0029

Hon'ble Judges : R.N. Biswal, J; L. Mohapatra, J

Bench : Division Bench

Advocate : Budhadev Routray, B.B. Routray, D. Routray and R.P. Dalei, for the Appellant; Additional Government Advocate For O. Ps. 1 to 4, Bijan Ray, Narasingha Patra, A.K. Patra, B.N. Shadangi, B.K. Mishra and M.K. Mishra for Intervenor, for the Respondent

Final Decision : Allowed

Judgement

L. Mohapatra, J.—This writ application has been filed in the nature of a Public Interest Litigation challenging the notice dated 13.7.2005 in Annexure-2 issued by opposite party No. 3 inviting applications for settlement of country liquor shop through lottery for the year 2005-2006 under Gopalpur charge in places such as Bikrampur, Hatipada, Majhigaon, Kusumi and Tata Colony.

2. The case of the Petitioners is that an Excise Policy for the year 2005-2006 was made by the Excise Department of State Government for different districts including the district of Ganjam. Under the said Excise Policy, licence in respect of Out Still (O.S.) and Country Spirit (C.S.) shops are required to be renewed every year subject to fulfilment of the conditions contained in the Bihar and Orissa Excise Act, 1915 (hereinafter called "the Act") and the Orissa Excise Exclusive Privilege Rules, 1970 (hereinafter called "the Rules"). On 30th of May, 2005, the Excise Commissioner was intimated that a decision has been taken by the State Government to introduce the Out Still (O.S.) System in Ganjam, Gajapati and

Dhenkanal districts in place of Country Spirit (C.S.). The allegations of the Petitioners are that the Collector, Ganjam (opposite party No. 3) has invited applications for settlement of exclusive privilege without following the procedure laid down under the Act as well as the Rules. The specific stand taken by the Petitioners is that public notice as required u/s 22 of the Act had not been issued and Petitioner No. 6 who is the Sarpanch of Kolithigaon Gram Panchayat had objected to the proposal initiated by the State Government, but such objection was not considered. Earlier in the year 2002-2003, a similar attempt was made and the same was challenged by the local public before this Court in O.J.C. No. 4503 of 2002 and this Court admitted the writ application and passed interim orders, as a result of which such shops could not be opened. In view of the operation of the interim order, no attempt was made in the year 2003-2004, but again in the current year an attempt has been made to open the O.S. shops in the same village. In the writ application, Annexure-2 has also been challenged on the ground that it violates Section 26-A of the Act, but at the time of hearing, the learned Counsel for the Petitioners fairly submitted that the proposed area not being a schedule area, Section 26-A of the Act has no application.

3. A preliminary counter-affidavit has been filed by opposite parties 3 and 4. It is stated in paragraph 8 of the said preliminary counter-affidavit that public notice in Form-A was issued by opposite party No. 3 on 14.12.2004 inviting objections against the proposal for granting exclusive privilege to manufacture and sell retail country liquor (O.S.) for the year 2005-2006. The last date for filing of objection was fixed to 31.12.2004. A copy of the said public notice was sent to the Chairperson of All Panchayat Samitis, Notified Area Councils, Municipalities and the Sarpanchs. In response to the said public notice, the Sarpanch of Kamalpur and villages of Hatipada submitted their objections and the objections were duly inquired into. During inquiry, it was noticed that in the year 2004-2005, forty-six excise cases were detected in Hatipada village area which clearly proves that the said area is prone to illicit liquor trade. The said inquiry report was considered and submitted to the Government through the Excise Commissioner whereafter a decision was taken for opening of a shop at Hatipada. The averment of the Petitioners is that an objection filed by the Petitioner No. 6 has been denied in the counter-affidavit. It is further contended in the counter-affidavit that if the shops are not allowed to be opened, business in illicit liquor will develop and to prevent such activities, it is necessary to open the shops.

4. Two intervenors, namely, J. Purusottam Reddy and Bhimsen Sahu, have filed a separate counter-affidavit. It is stated in paragraph 6 of the counter-affidavit of the aforesaid intervenors that they have deposited Rs. 12,00,000/- (Twelve lakhs) towards three months licence fee and have become successful in the lottery held pursuant to Annexure-2 on 11.8.2005. It is also stated in the counter-affidavit of the aforesaid intervenors that five lease agreements with five different land-owners have already been executed for necessary construction to be undertaken for distillation and storage of Mahua flower as well as rooms for

the staffs. Necessary accessories for manufacture of O.S. liquor have also been purchased. According to the said intervenors, they have already invested about Rs. 40,00,000/- (Forty lakhs) for the above purpose.

5. Shri Budhadev Routray, learned Counsel appearing for the Petitioners, submitted that the decision of the Government for grant of exclusive privilege having been taken in the month of May, 2005 under Annexure-1, public notice inviting objections could not have been issued prior to that. Referring to Annexure-1, it was contended by Shri Routray that by the resolution dated 30th of May, 2005, the Government was pleased to decide to introduce. Out Still Liquor System in Ganjam, Gajapati and Dhenkanal districts in place of Country Spirit System for the remaining period of 2005-2006 with effect from 1.8.2005. Since a decision was taken to introduce the O.S. Liquor System in May, 2005, public notice inviting objections as stated in the counter-affidavit could not have been issued on 14.12.2004. In this connection, reliance was placed by the learned Counsel on Section 22 of the Act and Rule 3 of the Rules. So far as contravention of Section 26-A of the Act is concerned, the learned Counsel for the Petitioners fairly submitted that it has no application to the facts of the present case.

6. The learned Additional Government Advocate representing opposite party Nos. 3 and 4 Shri Bijan Ray, learned Senior Advocate appearing for the two intervenors, contended that the proposal for switching over to O.S. System was mooted sometime prior to December, 2004 and at that stage public notice inviting objections was issued on 14.12.2004 in Form-A. In the said notice in Form-A, objections were invited for manufacture and sale of retail country liquor (O.S.) at Bikrampur, Hatipada, Majhigaon, Kusumi and Tata Colony. After receipt of objections, an inquiry was conducted and on the basis of the inquiry report, a decision was taken in the month of May, 2005 to open the shops. Relying on the documents annexed to the counter-affidavit it was contended by the learned Counsel for the aforesaid opposite parties that there has been compliance of Section 22 of the Act and Rule 3 of the Rules.

7. Shri Manoj Mishra, learned Counsel appearing for some other intervenors, supported the case of the Petitioners and opposed the opening of the shops.

8. From the counter-affidavit, it appears that public notice in Form-A for manufacture and sale in retail of country liquor (O.S.) had been issued on 14.12.2004 in the areas under dispute. In the said notice, it is clearly mentioned that the State Government intend to grant exclusive privilege of manufacturing and selling in retail of country liquor (O.S.) at the locality within the local area as mentioned in the notice for the period from 1.4.2005 to 31.3.2006. Admittedly, at this stage, the State Government had not taken any decision to open shops. After receipt of public objections and inquiry, a decision has been taken in the month of May, 2005. Therefore, the sole question that requires to be determined is as to whether public objections are to be invited at the stage of proposal or only after the State Government takes a decision in this regard. It is, therefore,

necessary to refer to Section 22 of the Act and Rule 3 of the Rules. Both the provisions for convenience are quoted below:

Section 22 of the Bihar and Orissa Excise Act, 1915

22. Grant of exclusive privilege of manufacture and sale of country liquor or intoxicating drugs - The State Government may grant to any person on such conditions and for such period as it may think fit, the exclusive privilege:

- (a) of manufacturing, or supplying wholesale, or
 - (b) of manufacturing and supplying, or
 - (c) of selling, wholesale or retail, or
 - (d) of manufacturing or supplying wholesale and selling retail, or any country liquor or intoxicating drug within any specified local area;
- (1-a) The State Government may also grant to any person, on such conditions and for such period as it may think fit the exclusive privilege for retail sale of foreign liquor within any specified place.

Provided that public notice shall be give of the intention to grant any exclusive privilege under preceding Sub-section and that any objections made by any person residing within the area affected shall be considered before an exclusive privilege is granted.

(2) No grantee of any privilege under Sub-section (1) or Sub-section (1-a) shall exercise the same unless or until he has received a licence in that behalf from the Collector or the Excise Commissioner.

Rule 3 of the Orissa Excise Exclusive Privilege Rules, 1970

3. Public notice and inviting objection: (1) A public notice as required by the proviso to Sub-section (1) of Section 22 of the Bihar and Orissa Excise Act, 1915 shall be given by the Collector on behalf of the State Government in Form "A" appended below and in the manner specified in the Sub-rule (2), (3), (4) (5) and (6) of this rule before granting any exclusive privilege mentioned in Section 22 of the Act.

FORM A

Public Notice

Whereas the State Government intend to grant exclusive privilege of(name of the intoxicant) at(name of the locality) within the local area mentioned before against each for the period of the grant (form.... to....) objections, if any, by any person residing within the said local area, are invited by (date). The objections if any shall be addressed to the undersigned and shall reach him on or before the aforesaid date. Any objection received after the said date will not be taken into consideration.

Collector.... (District)

Kind of exclusive privilege (1) Locality at which the privilege is to be exercised
(2) Local area (3)

(2) The public notice to be issued in Sub-rule (1) shall contain a list of police station limits, grama panchayats, municipal wards, wards of Notified Area Council or village(s) as may be convenient in each case, so as to indicate the local area within which the exclusive privilege is proposed to be granted.

(3) A copy of the public notice shall be conspicuously affixed in the locality at which the exclusive privilege is proposed to be granted.

(4) The contents of the public notice may also be proclaimed by beat of drums or by such other means as may be found convenient.

(5) An extract of the public notice shall be sent to the Chairman of each Municipality, Chairman of each Notified Area Council or Chairman of each Panchayat Samiti reproducing so much of the aforesaid lists as relates to his jurisdiction.

(6) An extract of the public notice shall be sent to the Commanding Officer of each of the Cantonments reproducing so much of the aforesaid list as relates to manufacture and/or retail sale of country liquor in the area within the limits of the Cantonment.

On a reading of Section 22 of the Act, it appears that under the said provision the State Government may grant exclusive privilege of manufacturing or supplying in wholesale or retail any country liquor or intoxicating drug within any specified area. Under Rule 3 of the Rules, the Government is required to invite objections from persons residing within the local area before a decision is taken for grant of exclusive privilege.

9. Now the question that arises for consideration is, "At what stage the public objection is to be invited?" Shri Routray, learned Counsel appearing for the Petitioners and Shri Manoj Mishra, learned Counsel appearing for some intervenors, submitted that only after the Government takes a decision to grant exclusive privilege in a particular area, notice inviting public objection is to be given whereas in the present case notice in Form A has been issued at the proposal stage. Learned Counsel appearing for the State submitted that after proposals were submitted, the Government had already taken a decision for grant of exclusive privilege for manufacturing and selling in retail country liquor (O.S.) and such intention of the State Government had been expressed in the notice issued in Form A on 14.12.2004. Annexure-8 to the rejoinder-affidavit filed by the Petitioners is the decision taken by the State Government and intimated to the Excise Commissioner on the 30th of May, 2005. Said document indicates that the State Government after careful consideration have been pleased to decide to introduce O.S. System in Ganjam, Gajapati and Dhenkanal districts in place of Country Spirit System with effect from the 1st of August,

2005 for the remaining period of 2005-06. It is further stated in the said document that the concerned Collectors will finalise the number of O.S. shops to be opened in each district keeping in mind the number of existing sanctioned C.S. shops and the erstwhile O.S. shops in the district along with the tentative location of each shop, invite objections, cause necessary inquiry and furnish the final list along with reserved price to the Government for approval through the Excise Commissioner, Orissa. This clearly indicates that by this decision the Government intended to open the O.S. shops in the aforesaid districts and it directed all the Collectors of the concerned districts to invite objections. Admittedly, no objection had been invited in the prescribed form after the decision was taken by the State and intimated to the Excise Commissioner on the 30th of May, 2005. In view of the above, we hardly find any force in the contention of the learned Counsel for the State that by 14.12.2004 a decision had been taken by the State Government and accordingly notice in Form A had been issued inviting public objections. Form Annexure-8, it is clear that by 14.12.2004 the State Government had not taken a decision to switch over from Country Spirit to O.S. From the record, it further appears that whatever objections had been received pursuant to the notice dated 14.12.2004 were only considered but no notice in Form A inviting objections had been published after the 30th of May, 2005. We have therefore no hesitation to hold that not only Section 22 of the Act but also Rule 3 of the Rules have not been followed because the Collector issued notice inviting applications for grant of exclusive privilege before inviting objections as per directions contained in Annexure-8. Learned Counsel for the Petitioner and the intervenors also relied on the order dated 28.4.2005 issued by the Department of Excise, Government of Orissa bringing in certain amendments. We have not referred to the same since we have already held that Section 22 of the Act and Rule 3 of the Rules have not been followed after the State Government's decision was communicated to the Commissioner of Excise on the 30th of May, 2005.

10. In view of the discussions made above, we allow the writ application and set aside Annexure-2 in which the Collector, Ganjam has issued notice inviting applications for settlement of country liquor shops through lottery for the remaining period of 2005-2006.

R.N. Biswal, J.

11. I agree.