(2012) 05 OHC CK 0006

In the Orissa High Court

Case No : O.J.C. No. 1195 of 2000 and W.P. (C) No''s. 565 of 2005 and 6236 of 2012

Smt. Jyosnamayee Bhanja — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 07-05-2012

Acts Referred:

Citation : (2012) 114 CALLT 511

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

Bench : Division Bench

Advocate : M. Kanungo, L. Kanungo, D. Pradhan, S.K. Misra, S. Achrya and D.J. Sahoo, for the Appellant; P. Panda, Addl. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—In these Writ Petitions the Petitioner is one & same person & the Opp. Parties are almost the same. In O.J.C. No. 1195 of 2000 the Petitioner challenges the legality of closure of her "ON" shop (beer parlour) from 01.08.1999 for non -payment of purported monthly licence fees on the ground that such levy is contrary to the provisions of the Bihar & Orissa Excise Act & the Rules made thereunder & the Policy formulated by the State Government. Further prayer is made for a direction to the Opp. Parties to refund a sum of Rs. 6,96,083 only to the Petitioner which has been wrongly paid by her & to comply with the Orders Dated 27.03.1998 & 07.10.1999 passed by the Commissioner of Excise, Odisha. In W.P.(C) No. 565 of 2005 the Petitioner has prayed for a direction to Opp. Parties to extend the benefits of M.G.Q. to the Petitioner as per the letter dated 02.05.2001 of the Joint Secretary to Government to Excise Department, Odisha & for a further direction to the Opp. Parties to renew the Petitioner''s licence on payment of licence fee on annual basis as per the Order Dated 17.5.2001 passed by this Court in Misc. Case No. 6334 of 2001 arising out of O.J.C. No. 1195 of 2000.

2. Though in W.P.(C) No. 6236 of 2012 the Petitioner has sought for several

reliefs, Learned Counsel Mr. M. Kanungo confines his prayer-only to a direction to Opp. Parties to renew the Petitioner''s licence for the year 2012-13 on payment of licence fee on annual basis as she is running a beer Parlour ''ON'' shop.

3. Since the relief sought & prayer made in all the above three Writ Petitions are interlinked & one common prayer for a direction to the Opp. Parties to renew the licence on payment of licence fees on annual basis treating her shop as a Beer Parlour "ON" shop, they were taken up together for bearing & are disposed of by "this common Judgment.

4. Bereft of unnecessary details, the Petitioner''s case in a nutshell is that the Petitioner is a licence holder of a beer parlour ''ON'' shop at Badambadi, Cuttack. She has been operating the said shop by paying licence fee & excise duty as fixed against her licence & her licence had been renewed till 31.3.2012. Earlier, the Petitioner moved this Court vide O.J.C. No. 1195 of 2000 challenging the action of the Opp. Parties in treating her beer parlour as an "OFF" shop & thereby fixing licence fee on monthly basis although a licence holder of a beer parlour is to pay a licence fee of Rupees one lakh per year on annual basis. In the said Writ Petition the Petitioner prayed for a direction to Opp. Parties to refund a sum of Rs. 6,96,038 which was illegally collected from her towards licence fees by treating her shop as IMFL ''OFF'' shop & not as ''ON'' shop beer parlour. In the said Writ Petition further prayer of the Petitioner was not to put the shop to auction. Vide order No. 20 dated 17.5.2001 in Misc. Case No. 6334 of 2001 this Court directed that if the shop in question is a beer parlour, there shall be no auction in respect of the said shop & the same shall be settled with the Petitioner on her paying the necessary annual licence fee as per latest Excise Policy dated 30th March, 2001. Pursuant to the said order of this Court, the authorities went on renewing licence of the Petitioner temporarily by extending the same at a gap of two months time for the whole year. Since the authorities did not renew her licence for the whole year & they went on enhancing the MGQ against her licence as IMFL licence, Petitioner moved this Court again by filing another Writ Petition being W.P.(C) No. 565 of 2005 with a prayer to renew her licence on annual basis as per the order of this Court dated 17.5.2001 & extend the benefit of lifting of MGQ as per Government notification by treating the Petitioner''s licence as beer parlour ''ON'' shop. When the Opp. Parties did not renew the Petitioner''s licence for the year 2012-13 & the Charge, Sub-Inspector of Excise sealed her Beer Shop on 31.03.2012 at 10.30 P.M., the Petitioner approached this Court in W.P.(C) No. 6236 of 2012. The said Writ Petition is pending before this Court for a direction to renew her licence for we year 2012-13. The Petitioner submitted the required documents with consideration money & the same has been approved by the concerned Charge Sub-Inspector of Excise for consideration, but the same has not been considered.

5. Mr. Kanungo, Learned Counsel appearing for the Petitioner submits that the Petitioner being the licence holder of beer parlour ''ON'' shop, she is required to pay licence fee of Rs. 1 lakh per year. But the Opp. Parties treating her beer

parlour as ''OFF'' shop has fixed the licence fee on monthly basis. The Petitioner made several representations to the authorities to renew her licence for the whole year & to treat her shop as beer parlour ''ON'' shop as per the Government Policy by fixing the licence fee & MGQ; Even though the Commissioner of Excise, Cuttack vide letter dated 1.10.1999 has clearly held that the Petitioner''s beer parlour be treated as ''ON'' shop & not as IMFL OFF shop, the said recommendation has not been accepted by the State. Government. Due to delay on the part apply by 15.02.1992. It was emphatically argued that the beer parlours which come under the category of IMFL OFF shops were to be settled on the basis of auction cum tender system. The fixed fee system in respect of settlement of beer parlour was restricted to the shops exclusively run by East Coast Breweries & Distilleries Ltd. which is evident from the Excise Policy communicated under letter dated 15.01.1991. Since the beer parlour of the Petitioner was already in existence from 1.4.1991 after having been settled with her being the highest bidder under the process of tender cum auction, the instruction of Government dated 23.12.1991 & subsequent communication dated 27.12.1991 are not applicable. The assertion of the Petitioner that since 1992-93 the Government took a policy decision that ON shop beer parlour should pay yearly licence fee of Rs. 36,000 is not applicable to the Petitioner as the said amount of Rs. 36,000 was fixed in respect of the beer parlour ''ON'' shop set up exclusively by E.C.B.D.L. Further departmental privilege communication is thoroughly misconceived inasmuch as when Government has taken a policy decision to settle beer parlour by way of auction cum tender system no reliance can be placed on these letters.

6. However, referring to affidavit dated 2.5.2012 Learned Govt. Advocate submits that the Petitioner preferred a Writ Petition before this Court vide O.J.C. No. 1195 of 2000 praying for refund of alleged excess consideration money paid by her in Misc. Case No. 6334 of 2001 & an interim order was passed on 17.5.2001 that there shall be no auction in respect of the said shop & the same shall be settled with the Petitioner on her paying the necessary annual licence fee as per the latest excise policy dated 30th March, 2001.

7. On the rival contentions the only question that falls for consideration by this Court is as to whether the Petitioner''s shop is a beer parlour ''ON'' shop or a beer parlour ''OFF'' shop?

8. To adjudicate this question, it is necessary to gather the intention of Government expressed through its various letters/ communications/orders/ decisions as to how they treat the Beer Parlours i.e. as "ON" Shop or "OFF" Shop. It is also necessary to refer to some orders passed by this Court in, various Writ Petitions on the basis of which the Petitioner''s beer parlour has been renewed from time to time till 31.3.2012 as a beer parlour ''ON'' shop on payment of licence fees on annual basis.

9. Under Secretary to Government in his letter No. 89/91 dated 23.12.1991 communicated to the Excise Commissioner, Orissa, Cuttack that pursuant to the

decision taken by Government concerning the Excise Policy for the year 1992-93, the East Coast Breweries may be given time up to 15.01.1992 for opening of beer parlour in the State. If they fail to apply by that time other parties may be given opportunity & they may apply by 15.02.1992. This letter further says that the beer parlours will be "ON SHOPS" & the operators of the parlour will have option to sell any kind of beer whether produced by East Coast Breweries or imported from other provinces. This letter clearly shows that the beer parlour in the State will be "ON" shops.

10. On a representation made by the Petitioner against collection of licence fees in respect of Badambadi beer parlour treating the same as Beer parlour "OFF" Shop & putting it to auction, the Government of Orissa in Excise Department vide its letter No. 1150 dated 30.4.1998 asked for a clarification from the Excise Commissioner, Orissa, Cuttack under which circumstances beer parlour at Badambadi was settled to auction deviating the excise policy for the year 1992-93 & the persons responsible for such irregularity may be intimated to the Department for appropriate action in the matter.

11. The Excise Commissioner, Orissa, Cuttack vide his letter dated 1.10.1999 addressed to the Addl. Secretary to Govt. Revenue & Excise Department, Orissa, Bhubaneswar inter alia communicated that as regards the beer parlour at Buxibazar, Cuttack which the Collector is treating as IMFI. ''OFF'' shop is actually beer parlour ''ON'' shop. This beer parlour may be settled with the intending person as a beer parlour ''ON'' shop by collecting annual licence fee of Rs. 1 lakh per annum.

12. All these above letters/communications go to show that the beer parlours are treated as beer parlour ''ON'' shops. This being so, there is no reason as to why the beer parlour at Badambadi run by the Petitioner shall be treated as beer parlour ''OFF'' shop. The policy of the Government cannot be interpreted & acted upon in different ways by different authorities subordinate to the Government. Law is well settled that every action of the State or its instrumentality should not only be fair, legitimate & above board but should be without affection or a version. It should neither be suggestive of discrimination nor even apparently give an impression of buyers'' favoritism & nepotism (See Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation,). Courts being custodian of law have a solemn duty to uphold the rule of law under all circumstances by directing the authorities concerned to act in accordance with law. If the rule of law is not enforced, it will certainly become a casualty in the process a costly consequence to be zealously averted by all, & at any rate, by the Court. [See Salkia Businessmen''s Association and Others Vs. Howrah, Municipal Corporation and Others, .

13. This Court on 17.5.2001 has passed the following order in Misc. Case No. 6334 of 2001 arising out of OJC No. 1195 of 2000.

There shall be no auction in respect of the said shop & the same shall be settled with the Petitioner on his paying the necessary annual licence fee as per the latest Excise Policy dated 30.3.2001.

The Petitioner was accordingly paying annual licence fee & the Opp. Parties were renewing the licence of the Petitioner''s shop on payment of annual licence fee by virtue of the aforesaid order of the High Court up to the year 2011-12. The said Order Dated 17.05.2001 has not been vacated or revised.

14. In view of the above, we do hot find any reason as to why the Collector, Cuttack put the Petitioner''s shop at Badambadi to auction by treating the same as beer parlour ''OFF'' shop in stead of settling the same on annual licence fee basis. Such action of the Collector, Cuttack is impermissible under law. Accordingly, we direct the Opp. Party- Collector, Cuttack to renew the Petitioner''s licence for the year 2012-13 treating the beer parlour run by her at Badambadi as the beer parlour ''ON'' shop on receiving the annual licence fee without putting the said shop to auction. The Petitioner is entitled to get refund of excess licence fee paid by her due to settlement of beer parlour by way of auction deviating the excise policy. In the result, all the aforesaid Writ Petitions are allowed to the extent indicated above. No cost.

